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Employer's handbook rules discourage protected labor activity

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Guardsmark, LLC, a company providing security guard services, distributed a handbook to its uniformed employees. The Service Employees International Union filed an unfair labor practice charge challenging three of the handbook's rules. The chain-of-command rule told employees not to register complaints with any representative of Guardsmark's clients. A second rule prohibited solicitation and distribution of literature by employees while on duty or in uniform and the third rule prohibited employees from fraternizing on duty or off duty with other employees.

The National Labor Relations Board's General Counsel issued a complaint alleging that all three rules violated

Section 8(a)(1) of the National Labor Relations Act (the "Act"), which makes it an unfair labor practice for an employer to interfere with, restrain, or coerce employees in the exercise of their Section 7 rights. Section 7 of the Act provides that employees:

...have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities....

The General Counsel charged that Guardsmark's rules discouraged protected labor activity, such as enlisting the support of customers for work grievances, soliciting and distributing literature while off duty, and meeting with other employees to discuss terms and conditions of employment.

The Board adopted an Administrative Law Judge's ("ALJ") conclusion that the chain-of-command rule prohibited protected labor activity because nothing in the rule limited its application to working time. The Board disagreed with the ALJ regarding the nonsolicitation rule, concluding that employees would not reasonably construe the rule to include a "safe harbor" for removing or covering their uniforms while soliciting off duty in order to comply with the rule. The Board agreed with the ALJ that the fraternization rule prohibited only personal entanglements and that employ-

ees would reasonably understand it not to apply to protected activity. The case was appealed to the Federal Court of Appeals.

The chain-of-command rule stated:

While on duty you must follow the chain-of-command and report only to your immediate supervisor. If you are not satisfied with your supervisor's response, you may request a meeting with your supervisor and his or her supervisor. If you become dissatisfied with any other aspect of your employment, you may write the Manager in Charge or any member of management. Written complaints will be acknowledged by letter. All complaints will receive prompt attention. *Do not register complaints with any representative of the client.*

(Emphasis added).

Because employees have a statutorily protected right to solicit sympathy, if not support, from the general public and customers regarding their terms and conditions of employment, the Court found the Board's conclusion that the rule explicitly prohibits Section 7 activity was "reasonably defensible."

Since mere maintenance of a rule likely to chill Section 7 activity may constitute an unfair labor practice even absent evidence of enforcement of the rule, the Board had no obligation to consider whether Guardsmark actually enforced the rule against its employees.

The non-solicitation rule stated:

Solicitation and distribution of literature not pertaining to

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Employer's obligations under the Uniformed Services Employment and Reemployment Rights Act

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Phil is one of your stellar employees. Having been with your company for the past seven years, he is a top earner and possesses outstanding interpersonal and leadership skills. He is a loyal, valuable member of your team, and has risen through the ranks to management. His absence, especially in today's competitive market, will surely be felt, both in terms of the bottom line and in terms of morale, direction, and energy.

In addition to working for your company, Phil serves as a helicopter pilot in the United States Army Reserve. During his interview seven years ago, you recall discussing Phil's flight training and some of the missions he flew in Bosnia and Macedonia while he was on active duty after college. Impressed by Phil's education, training, and apparent maturity beyond his years, you offered him the position—a decision that has served you and the company well.

Since that time, however, you have given little, if any, thought to Phil's status as a reservist, knowing simply that Phil has managed to meet his obligations to the Reserves without any apparent disruption to his performance on the job.

Amidst the Global War on Terrorism, Phil reports to you that his reserve unit has received an alert for mobilization—for a one-year tour to provide aviation support to operations in Iraq and that he must be ready to deploy within 30 days.

Beyond your personal desire to support Phil and his family through this challenging time, the Uniformed Services Employment and Reemployment Rights Act ("USERRA") creates certain obligations with which your company must comply, and simultaneously vests certain rights in Phil regarding his tenure with your company.

Some of the central issues that you, as an employer, may face when your employees are called to active duty are addressed below.

I. What is USERRA?

USERRA is a federal law governing Phil's right, as a servicemember, to reemployment after completion of military service.¹ Generally speaking, if Phil leaves his civilian job for duty in the "uniformed services," he is entitled to return to the job, with accrued seniority.

USERRA provides that any employer or prospective employer, cannot deny Phil initial employment, reemployment, retention in employment, promotion, or any benefit of employment because of Phil's status member of the "uniformed services," because has been a member of a uniformed service, or because Phil has an obligation to perform duty in the uniformed services.

II. What are the "Uniformed Services?"

These services include the Army, Navy, Marine Corps, Air Force, Coast Guard, and Public Health Service commissioned corps, as well as the reserve components of each of these services.² In the case where the Governor of a State calls out the National Guard, USERRA does not apply.³

III. What employers are affected by USERRA?

USERRA applies to all employers in the United States, regardless of the size of their businesses. It protects part-time positions, unless the employment is for a brief, non-recurring period and is not expected to last indefinitely or for a significant period. USERRA does not protect independent contractors and others considered to be self-employed.⁴

IV. Must Phil Use His Accrued Vacation?

For a period of military service, Phil may elect to use any personal vacation he may have accrued. You cannot, however, require Phil to use vacation. Phil does not accrue vacation during a period of military service unless you provide this as a benefit for employees on a nonmilitary, non-paid leave of

absence of similar duration.

V. What is an employer required to provide to a returning servicemember upon reemployment?

Phil, as a returning servicemember, enjoys the following entitlements:

1. Prompt Reinstatement. Following a period of up to 30 days of service, an employee must report back to work almost immediately. The employee should be put back on the payroll immediately upon reporting back to work. Following a longer tour, however, an employee must submit an application for reemployment, and the employer is required to act on the application promptly, even if there does not appear to be a vacancy at the time the application for reemployment is submitted. Sometimes, it is necessary for the employer to displace another employee to make room for the returning servicemember.⁵

2. Accrued seniority as if the employee has been continuously employed. A returning servicemember must be treated as if he has been continuously employed for purposes of the employer's system of seniority, if any. As the Supreme Court noted upon interpreting an earlier iteration of this law, "[t]he returning veteran does not step back on the seniority escalator at the point he stepped off. He steps back on at the precise point he would have occupied had he kept his position continuously during [his military service].⁶ If the employer does not have a system of seniority, then a returning servicemember is entitled to his pre-service job or another job of like status and rate of pay.

USERRA also applies this "escalator principle" to pension plans, including defined contribution plans and defined benefit plans. A returning servicemember must be treated as if he had been continuously employed in determining when he vests and in determining the benefit computation upon retirement.

Where a servicemember contributes to the plan, he must make retroactive contributions to benefit from the "escalator principle." To encourage returning servicemembers to do so, USERRA provides an extended period of time within which to make up back contributions, without interest, of up to three times the period of service, not to exceed five years.

3. Status. A returning servicemember is entitled to the status he would have attained if continuously employed. For example, if the servicemember was a Nurse Manager, reinstating her as an "Assistant Nurse Manager" is against the law, even if the pay is the same, because the status is not the same.⁷

Location is also an aspect of status.⁸ For example, if the returning servicemember worked at the downtown emergency room, reinstating him in the suburban location runs contrary to the law.

4. Health Insurance Coverage.

Upon returning to work, a servicemember is entitled to immediate reinstatement of her civilian health insurance coverage, with no waiting period and no exclusion of pre-existing conditions, other than those conditions which the Department of Veterans Affairs has determined to be service-connected. Her family is also entitled to full reinstatement.⁹

5. Non-seniority Benefits. If you provide continued life insurance coverage, holiday pay, Christmas bonuses, and other non-seniority benefits to other employees on furlough or leaves of absence, then you must offer these benefits to Phil, during the period of his service.¹⁰

6. Training. Given that Phil has been away for at least a year, upon his return, he may very well find changes have occurred in terms of new equipment and methods. In this regard, you must ensure that Phil is qualified for his position by making "reasonable efforts" to provide Phil training or retraining. "Reasonable efforts" is defined as "actions, including training by an employer that do not place an undue hardship on the employer." "Undue hardship" is defined as "actions requiring significant difficulty or expense, when considered in light of ... the overall financial resources of the employer [and several other factors]." This is similar to the definitions of "reasonable accommodations" and "undue

hardship" found in the Americans With Disabilities Act ("ADA"). Unlike the ADA, however, USERRA does not exempt very small companies.

If Phil was injured or disabled during his mobilization, you must make reasonable efforts to accommodate his disability. However, there are some disabilities which cannot be accommodated by reasonable employer efforts. For example, a blinded nurse can no longer work in the cath lab. In this instance, where a veteran, due to his disability, is disqualified from his pre-service job, the company must reemploy the veteran in some other position which is the "nearest approximation" of the position to which the veteran is otherwise entitled, in terms of seniority, status, and pay.¹¹

Importantly, a disability need not be permanent to confer these rights. For example, if Phil broke his leg during his service, the company must make reasonable efforts to accommodate his broken leg, or place him in an alternate position, until his leg is healed.

7. Special Protection Against Discharge. If Phil's period of service was 181 days or more, the company must not terminate him for anything but thoroughly documented cause within one year of his return. USERRA creates a one year safe harbor of special protection against discharge. The company bears a very heavy burden of proof to demonstrate that Phil was discharged for cause, the idea being, to protect Phil from a bad faith or pro forma reinstatement.¹²

VI. Are There Circumstances Where My Company Does Not Have To Comply With USERRA?

Yes. The company does not have to comply with USERRA under the following circumstances:

1. Intentional Last Minute Notice. USERRA requires Phil to provide you with notice, either orally or preferably in writing. If Phil learned of his mobilization, and intentionally withheld that notice until the last moment, you may be able to terminate Phil, under limited circumstances.¹³

2. Service More Than Five Years. Compliance with USERRA is not required if Phil spends more than five years away from work on active duty.¹⁴

3. Characterization of Service. If Phil is convicted at court-martial and

receives a punitive discharge or dismissal (a dishonorable discharge for officers), or receives an "other than honorable administrative discharge," USERRA does not protect his reemployment.¹⁵

Following a period of 31 days or more of Phil's service, the company can request that Phil submits documentation that he has not exceeded the 5 year limit and that he is not disqualified from reemployment by virtue of having received a punitive or "other than honorable" administrative discharge. Phil must submit what documentation is readily available, which include a DD-214 (discharge document), a letter from Phil's commanding officer, or endorsed copies of Phil's military orders.¹⁶

VII. When Must Phil Return To Work?

That depends on the length of his service.

If Phil's deployment is 30 days or less, he must report back to work "not later than the beginning of the first full regularly scheduled work period on the first full calendar day following the completion of service and the expiration of 8 hours after a period allowing for safe transportation from the place of service to the person's residence."¹⁷

If Phil's service was between 31 and 180 days, he must submit an application to return to work within 14 days.¹⁸

Following a period of 181 or more days of service, Phil must submit an application to return to work within 90 days.¹⁹

If Phil misses a deadline, without adequate cause, he does not automatically lose his reemployment rights, but, will be subject to the company's normal policies concerning explanations and discipline for unexcused absences.²⁰

Any of these deadlines can be extended by up to two years if Phil is hospitalized or convalescing from a service-connected injury or illness.²¹

VIII. How Is USERRA Enforced?

By the Department of Labor, by private counsel, or both. The Veteran's Employment and Training Service ("VETS") of the Department of Labor assists veterans claiming rights pursuant to USERRA. VETS enjoys subpoena power so that it can obtain access to witnesses and documents.

VETS will contact the company to

explain the law and conduct an investigation in light of a request for assistance from a servicemember. If the investigations establish that a violation has likely occurred, and if efforts to obtain voluntary compliance are not successful, VETS will refer the case to Attorney General if the employer is a private employer.

Servicemembers can also file suit directly through privately retained counsel. If the servicemember prevails, the federal court can order the company to pay the servicemember's attorneys' fees and litigation expenses. For violations, the court may order the company to compensate the servicemember for lost pay, including interest. If the court finds a willful violation, the court can double the back pay award.

Conclusion

There are currently more than 150,000 members of the Armed Forces Reserve and the National Guard on active duty in support of the War on Terrorism. Failing to observe USERRA's requirements not only poses monetary penalties, but also presents a potentially damaging public relations issue.

1. 38 U.S.C. §§ 4301 - 4333, Public Law 103-353, 108 Stat. 3149, fully effective on December 12, 1994. USERRA is a complete re-write of the Veterans' Reemployment Rights law.

2. § 4303(16).

3. § 4303.

4. § 4303(4).

5. See *Cole v. Swint*, 961 F.2d 58, 60 (5th Cir. 1992).

6. *Fishgold v. Sullivan Drydock & Repair Corp.*, 328 U.S. 275, 284-85 (1946).

7. See *Ryan v. Rush-Presbyterian-St. Luke's Medical Center*, 15 F.3d 697, 699 (7th Cir. 1994).

8. See *Armstrong v. Cleaner Services, Inc.*, 79 L.R.R.M. 2921 (M.D. Tenn. 1972).

9. § 4317.

10. § 4316(b)(1)(A).

11. See *Hembree v. Georgia Power Co.*, 637 F.2d 423 (5th Cir. 1983).

12. See *Carter v. United States*, 407 F.2d 1238 (D.C. Cir. 1968).

13. *Burkart v. Post-Browning, Inc.*, 859 F.2d 1245 (6th Cir. 1988) (upholding firing of National Guard member who withheld notice until the last moment).

14. § 4312(a)(2).

15. § 4304.

16. § 4312(f)(1).

17. § 4312(e)(1)(A)(i).

18. § 4312(e)(1)(C).

19. § 4312(e)(1)(D).

20. § 4312(e)(3).

21. § 4312(e)(2)(A).