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Attorneys Representing Management in Labor and Employment Law

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Inside this issue:

DOL Hard at Work: New Proposed Regulations for Uniformed Services Employees ... 1

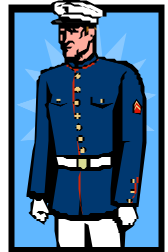
Recent Victories for Our Clients ... 1

Something to Think About ... 2

The Lawsuit Abuse Reduction Act of 2004 Passes the House ... 2

Labor Notes ... 4

DOL Hard At Work: New Proposed Regulations For Uniformed Services Employees



The Veterans' Employment and Training Service (VETS), a division of the Department of Labor (DOL), issued proposed regulations in September 2004 pertaining to the Uniformed Services Employment and Reemployment Rights Act (USERRA). Apparently, the DOL has been hard at work since they also just recently issued final regulations pertaining to White Collar Exemptions under the Fair Labor Standards Act.

USERRA has been around since 1994. It was enacted to protect the rights of individuals who voluntarily or involuntarily leave employment to serve in the military. USERRA offers non-discrimination and re-employment rights, as well as benefit/seniority continuation rights. While the proposed regulations do not seek to impose any new obligations on employers, there are some areas where VETS has broadly interpreted the law, which may pose burdens for management down the road. For example:

- USERRA is interpreted to give employees re-employment rights, (See *Workplace Chronicle*, November 2001) and not merely prohibit discrimination. The proposed regulation rejects a Sixth Circuit case, Curby v. Archon, 216 F.3d 549 (6th Cir. 2000), which had found that USERRA only offered non-discrimination protections.

- The proposed regulations define "employee" broadly to include temporary, probationary, seasonal, and former employees. Unlike the FMLA, for example, even newly hired employees are protected because USERRA does not impose a minimum service requirement for employee eligibility. Also distinguishable from the FMLA, USERRA has no requirement that covered employers have a certain threshold number of employees.

- The proposed regulations extend "time-off rights" beyond military duty, to include time before a person actually enters service to get his/her affairs in order. Given the "fact specific" nature of this inquiry, there will likely be much room for litigation.

- The proposed regulations state that employers cannot require employees to obtain advance consent as a condition for military leave. Furthermore, employers cannot require employees to decide prior to service whether or not they plan to return to work and employees reserve the right to defer this decision. This means that employees on military leave could be on the payroll indefinitely, even though months or years go by without hearing from them.

- When counting the 5-year maximum, the proposed regulations dictate that only actual service time is to be counted, not the time for travel, to get personal affairs in order, or due to delays in activation, etc.

continued on page 3 ...

Recent Victories for Our Clients

PCT recently obtained dismissal of a whistleblower and public policy discharge case originally filed in state court by a commissioned salesperson. The case had been dismissed because the salesperson had agreed to arbitrate such a dispute when he was first hired six years earlier. After dismissal, the case proceeded to arbitration where the Arbitrator denied the claims following four days of hearing. PCT was able to dispel any notion that the salesperson had been retaliated against because he made a police report by showing that others received similar treatment in the months following the police report. PCT obtained admissions from the union steward and other co-workers that the supervisor had become increasingly harsh toward them as well as the grievant. This eliminated the causation element of the grievant's case. Moreover, PCT was able to defeat grievant's claim of constructive discharge by showing that he essentially sat back for six years without complaining but for occasionally grousing to his immediate supervisor. ❖

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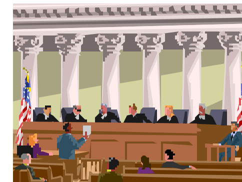
- Policy—Wage Deductions
- Relief of Charge
- Sample CCW Memo
- Sample Certification for Users of Consumer Report
- Severance Agreement and Release of Claims
- Severance Agreement and Release of Claims (In Compliance With Older Worker Benefit Protection Act)
- WH 380/381 Forms (under FMLA guidelines)
- Workplace Violence—Risk Factor Checklist

The Lawsuit Abuse Reduction Act of 2004 Passes In The House

On September 14, 2004, the House of Representatives passed "The Lawsuit Abuse Reduction Act of 2004" by a 229-174 vote. The proposal would make sanctions for filing frivolous federal lawsuits mandatory rather than discretionary and would extend the Rule 11 sanction provisions to state court actions, which affect interstate commerce. While the Plaintiff's bar views the bill as a barrier to litigation, we believe it is a step in the right direction. Clearly, something must be done given the large number of frivolous lawsuits we see on a daily basis. Even though we have had good success obtaining sanction awards over the years, the discretionary nature of the rule has allowed too many of our opponents to get off "scott free" after forcing our clients to spend their time and money proving themselves innocent.



Even though under the proposal a judge must still determine that the case is frivolous, the mandatory nature of the sanction offers our clients more ammunition for firing back when faced with frivolous lawsuits. The bill also eliminates the "safe harbor provision" currently found in Rule 11. That provision allows a party to avoid sanctions by withdrawing the case within 21 days of a motion for sanctions. The bill also proposes a mandatory one year suspension from appearing in federal court where an attorney violates Rule 11 three or more times in his/her career. Moreover, the bill contains another section entitled, "Prevention of Forum-Shopping," which requires that personal injury cases be filed where the plaintiff resides, where the plaintiff was allegedly injured, or where the defendant's principal place of business is located.

The American Tort Reform Association indicates that lawsuit abuse is a barrier to economic growth and that each year every U.S. citizen pays more for frivolous litigation and other abuses of our civil justice system. One report suggests that the cost of lawsuit abuse as the second half of 2004 takes shape is at an all-time high across the country, and that today, the average family of four pays a $3,236 annual "tort tax," a cost added to the price of products and services needed to cover the costs of litigation.

From here, the bill goes to the Senate and then must be signed into law by the President. Of course, the November election should have a decisive affect on whether the bill actually becomes law. Indeed, given the partisan nature of the vote (only 16 democrats voting for the bill and three republicans voting against the bill) coupled with John Edwards' background, only a Bush re-election would likely allow the bill to become law. ❖

SOMETHING TO THINK ABOUT

Imagine the following: You are driving home after a long day of work. It is rush hour and traffic is heavy. You haven't spoken to your spouse all day and you call home. You take your eye off the road for a split second while dialing the number. This causes you to swerve onto the shoulder of the road momentarily. We do not think it is too bold to suggest that this has probably happened to most of us. It isn't hard to do.

Now imagine the following: your employee is driving from one sales appointment to another. He dials up the person he is supposed to meet with next on his cell phone to tell her he is running a few minutes behind. Your employee takes his eye off the road momentarily to dial up the number. He swerves and hits something on the shoulder of the road. It could be a pot hole; it could be a fallen branch. ***But, it could be a person walking on the shoulder of the road.***

continued on page 3 ...

... continued from page 2

Something to Think About ...

This is what happened on March 8, 2000 in Loudoun County Virginia. Jane Wagner, an attorney at the law firm of Cooley Godward LLP, was making a business call on her cell phone as she drove down Route 7. She swerved off the road and struck a 15 year old girl sending the girl over the guardrail to her death. The girl had just gotten out of the family minivan after arguing with her brother. The girl's mother watched in horror from the minivan as her daughter was struck.. Ms. Wagner did not stop. She later said she thought she had struck a deer. Wagner was fired from her job at the law firm and automatically forfeited her Virginia law license as a result of pleading guilty to hit and run, a felony, which ultimately sent her to jail for a year. A jury also ordered her to pay in excess of $2 million dollars in damages to the girl's family.

The civil lawsuit also named Wagner's employer because she had been making a business call at the time of the accident. The firm settled for an undisclosed amount. The case is one of several recent suits nationwide against employers whose employees have been involved in vehicle accidents while making business calls. Several companies have made payouts in similar cases. These suits have reportedly caused some businesses to prohibit their employees from using cell phones while driving.

Employers should at a minimum adopt policy language which addresses the use of cell phones while driving company vehicles, during working hours and when making business related phone calls. Although many would agree that a flat out prohibition would be unrealistic, employers should consider limiting the placement of calls to times when the vehicle is stopped. Moreover, some language should be placed into your typical vehicle usage and/or safety policies, which states that employees must use caution when using their cell phones while operating a moving vehicle. Also, for those employees who have not programmed their cell phones to speed-dial frequently used numbers like the home office, for example, you should take it upon yourself to assist employees in that regard. Certainly, if you limit the placement of calls to times when the vehicle is not moving, the policy must be enforced. For example, if an employee calls into your facility and tells you she is traveling southbound on I-75, you would probably want to issue some form of reprimand. ❖

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DOL Hard at Work ...

- The proposed regulations interpret USERRA to require employers to permit employees to participate in health insurance under the same conditions as if working, to the extent leave is fewer than 31 days. After that, employees may be required to pay for the benefits (in accordance with other similar leave policies), for a period of up to 18 months. VETS has invited comment as to whether there should be a date certain for election of coverage.

- Even though USERRA requires employees to notify their employers of the need for leave in most cases, the proposed regulations forbid any particular form and authorize notice from a service individual rather than the employee directly. Thus, it appears that verbal notification from a complete stranger will be appropriate.

The above are only a summary of the proposed regulations. If you would like to access the proposed regulations in their entirety, they can be accessed by going to:

http://www.regulations.gov/AGCY_VETERANSEMPLOYMENTANDTRAININGSERVICE.cfm.

The DOL has invited comments on the proposed rules, which are due next month-by November 19, 2004.

Employers are wise to familiarize themselves with USERRA and its proposed regulations, and make sure their military leave policies are up-to-date, as VETS has vowed to take other steps, in addition to the proposed regulations, to minimize USERRA violations including: (1) Providing briefings to more than 158,000 service members and others on USERRA, (2) Responding to almost 26,000 requests for technical assistance, (3) Distributing more than 240 televised Public Service Announcements, and (4) Addressing most of the major human resource and employer organizations. ❖

LABOR NOTES

Sixth Circuit Protects Transsexuals from Stereotyping

The Sixth Circuit recently held that a self-identified transsexual can sue for sex discrimination under Title VII on the basis of discrimination because of non-stereotypical behavior in appearance. Smith v City of Salem, 378 F3d 566 (ND Ohio) (August, 2004).

Smith was a lieutenant in the fire department. He considered himself a transsexual with Gender Identity Disorder. He began "expressing a more feminine appearance" which drew complaints about his non-masculine behavior from coworkers.

The Fire Chief and City law department devised a plan to require Smith to undergo psychological evaluations, hoping he would resign or refuse to comply -- prompting termination.

Smith learned of the plan and filed suit. His case was dismissed and he appealed. The lower court held, "Title VII does not prohibit discrimination based on an individual's transsexualism." Price Waterhouse v Hopkins, 490 US 228 (District of Columbia) (1989)

The Sixth Circuit disagreed. It held Title VII was available for transsexuals because it prohibited sex discrimination against both men and women. The court said that having alleged his failure to conform to sex stereotypes of how a man should look and behave was the driving force behind the City's action, Smith did state a claim of sex stereotyping and gender discrimination. That is, Smith's employer took action against him on the basis of his appearance.

The Sixth Circuit's interpretation is at odds with pre Price Waterhouse holdings in the 7th, 8th and 9th Circuits that Title VII does not prohibit discrimination against transsexuals. But compare, Johnson v Fresh Mark, Inc., 98 Fed Appx 461 (ND Ohio) (May, 2004). The holdings made before Price Waterhouse, are now vulnerable to renewed challenges.

ADA specifically excludes transsexualism as a protected condition, 42 USC 12211 (b)(1). Likewise, a homosexual or transvestite is not protected. However, employers should proceed with care in dealing with employees exhibiting transsexual tendencies or declaring themselves to be transsexual because of the sex discrimination provisions of Title VII. ❖

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