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STAND AT ATTENTION:

New USERRA Rights and Obligations

*By: Ryan L. Long**

The U.S. Department of Labor ("DOL") recently adopted final regulations implementing the Uniformed Services Employment and Reemployment Rights Act of 1994, or USERRA. USERRA protects the rights of persons who voluntarily or involuntarily leave employment positions to undertake military service. It applies to all U.S. public and private employers, regardless of size. USERRA's regulations provide guidance concerning both employer and employee rights and obligations under USERRA and became effective on January 18, 2006.

Since the regulations apply to all employers, employers should take the time to ensure full compliance. USERRA's regulations are divided into six subparts. Subpart A provides a general introduction, defining certain terms for purposes of USERRA. Subpart B describes prohibited employer conduct, including USERRA's anti-retaliation and anti-discrimination provisions, and defines the applicable legal framework for analyzing such claims. Subpart C states the procedural requirements for reemployment, including notice, coverage and time limits for service. Subpart D describes the manner in which employees accrue benefits they would otherwise be entitled to as an employee. Subpart E explains the reemployment rights of service members. Finally, Subpart F contains the compliance and assistance provisions.

Subpart A essentially restates the statutory definitions contained within USERRA, and also excludes federal employees from the ambit of the regulations. Subpart B prohibits employers from denying employment, reemployment, retention, promotion, or any benefit of employment to an individual on the basis of his or her membership or service in the uniformed services, and also prohibits retaliation against employees for exercise of USERRA rights. This subpart also describes the applicable burdens of proof for a USERRA claim.

In Subpart C, the regulations establish the general eligibility requirements for reemployment, then describe the applicable procedures for reinstatement of employees. Thus, an employee will be eligible for reemployment following uniformed service if: 1) the employer had advance notice of the employee's service; 2) the employee's cumulative service totals five years or less during his or her employment relationship with a particular employer; (3) the employee timely returns to work or applies for reemployment; and (4) the employee was not separated from service with a disqualifying discharge or under other than honorable conditions.

As stated in the regulations, USERRA protects any absence that service in the uniformed services necessitates. To invoke USERRA rights, an employee (or appropriate officer of the employee's uniformed service) must give his or her employer advance notice that the employee intends to leave his or her job to perform military service. USERRA does not establish a specific time period for notice nor does USERRA prescribe the manner in which an employee gives notice.

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COBRA ADMINISTRATION:

Clarity = Bliss

*By: Helena Oroz**

It is an unconfirmed theory, but it may be that many COBRA issues could be avoided if only one ingredient was added to the mix: clarity. If all the interested parties have the pertinent information, know their own obligations, and understand everyone else's obligations, how can they go wrong?

In *Krippendorf v. Mitchell*, the U.S. District Court for the Eastern District of Arkansas recently decided, quite simply, that the employer just got it wrong. The employee worked as a salesperson for the employer, an Arkansas company apparently subject to that state's "baby COBRA," or state version of the federal law that mandates continuation of health care coverage under certain circumstances. (This generally means that the employer is small enough to be exempt from COBRA). While this is not *exactly* a COBRA case, it is nonetheless instructive.

The employee received health insurance benefits under the employer's group health insurance policy. Under the plan, the employee paid a portion of the health insurance premium for himself and his family ($86.89), which the employer deducted from each of the employee's bimonthly paychecks. The employer paid the rest of the premium. The employee quit his job on Monday, April 18, 2005 without advance notice. His last paycheck covered half the month – April 1 through Friday, April 15, 2005 – and as usual, the company deducted $86.89 for the employee's portion of the heath insurance premium. The company's benefits administrator gave the employee the forms required to continue his health insurance coverage – and that is apparently where everyone ceased being on the same page.

The employee returned the forms with a check for the first month's premium ($768.15) at the beginning of May. The company cashed the employee's check, but for some reason sent neither the employee's premium payment nor his continuation of coverage form to the insurance company. Instead, the company *cancelled* the employee's coverage retroactive to April 1, 2005. The employee, unaware that the company had cancelled his coverage, sent the company his second month's premium payment. The employee learned of the cancellation only when his wife sought medical treatment and was informed that her health insurance had lapsed.

The employer finally sent the employee's continuation of coverage form to the insurance company in early June 2005–but *still* did not pay his health insurance premium. The employee's attorney contacted the Company on June 13, 2005 to warn that he would file suit in federal court if the employee's health insurance benefits were not reinstated before June 16. The company actually did reinstate the employee's insurance on or about June 16, 2005, but did not notify the employee or his attorney of the reinstatement until June 27, 2005.

By this time, the employee, left in the dark about the status of his insurance, had filed suit in court alleging ERISA and state law claims. The employee alleged that the company breached its fiduciary obligation under ERISA to send the appropriate premiums to the insurance company each month. He sought the amount equal to the portion of the premium that the company should have paid for the time period of April 1 to 18, 2005, as well as attorneys' fees and costs.

The court found that, under the plan, the employee was supposed to receive the benefit of health insurance coverage for the time period of April 1 through April 15 at a cost of only $86.89 to himself, and that the company had actually deducted that amount from his last paycheck.

The court further found that when the company accepted the employee's first monthly premium check in early May 2005, it did not apply the money toward the employee's continuation coverage, which should have started after his employment ended on April 18, 2005. Instead, the employer applied the funds retroactive to April 1, a problem because:

- the employee was still working on April 1. His last paycheck covered his last pay period (April 1 through April 15, 2005), and the employer had already withdrawn the regular $86.89 employee share from that paycheck to cover that period of time;
- the employer should already have paid *its* share of the employee's premium for this time period as well;
- and, essentially, because the employer did not prorate the employee's premium payment appropriately, the employee overpaid.

The court found that the employee overpaid by $384.08–half of his $768.15 premium payment for the whole month. The court ordered a

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COMPENSATION INOCULATION:

Vaccinating Your Workers' Compensation Premium Against Rising Health Care Costs

*By: Steve P. Dlott**

Between 2000 and 2005, the number of workers' compensation claims filed in Ohio has dropped by approximately 10 percent (from 208,301 in 2000 to 178,015 in 2005). Clearly, employers have made significant inroads in workplace safety.

Unfortunately, the news is not all good for employers. Even as the number of filed claims has fallen, the cost of those claims has increased dramatically. Between 2000 and 2005, medical costs for workers' compensation claims jumped by almost $300 million. This increase represents a nearly 30 percent increase in medical costs over five years. Indeed, the Bureau of Workers' Compensation ("BWC") altered its system for setting reserves to account for medical costs in response to this increase.

What accounts for this sharp rise in medical costs? Unquestionably, the number one culprit is the BWC's exceedingly generous reimbursement rates. It is a well-known secret that the BWC's reimbursement rate for medical services is much higher than that of private health insurers and other government-funded insurance programs. The *Columbus Dispatch* recently reported that from 1998 through 2004, the Bureau paid $543.6 million more for the medical treatment of injured workers than the actual cost of providing those services.

Relying on the BWC offers little hope of staunching these hemorrhaging medical costs. Relief by way of reduction of reimbursement rates for medical services is not very encouraging. State-funded employers are at the BWC's mercy when it comes to establishing those generous reimbursement rates.

Although the BWC offers little hope for relief, there is one important first step available to employers in this battle to control medical claims costs. Employers can contract with medical facilities, such as an urgent care facility, for the initial post-injury treatment. While this contract only applies to non-emergency type injuries, such injuries comprise the vast majority of soft-tissue injuries, such as back or neck strains, which often develop into more serious, and more costly, ailments.

Getting that initial diagnosis and, equally important, return-to-work recommendation from a physician of the **employer's** choice is essential to controlling overall claims costs. Presenting documentation from the employer's doctor releasing the claimant to work (even on light duty) is of critical importance at a hearing in challenging the claimant's certification disabling the claimant from employment for an extended period of time.

Unquestionably, the most common mistake employers make is taking a "wait and see" attitude before deciding to fight a workers' compensation claim. Often, by the time the employer discovers the claim's impact on its workers' compensation premiums, the damage has already occurred. A medical report from the employer's doctor returning the claimant to work immediately after the injury is the best prescription for fighting a medically suspect claim. Armed with such a report, the employer can stave off frivolous claims and limit the effect such claims exert on workers' compensation premiums.

**Steve Dlott defends employers in all aspects of workers' compensation law. For more information about workers' compensation claims, or preventative claims administration or aggressive claims management, please contact Steve at (216) 696-4441 or spd@zrlaw.com.*

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Zashin & Rich Co., L.P.A. represents individuals in all facets of domestic relations law and employers in all aspects of workplace law.

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STAND AT ATTENTION: New USERRA Rights and Obligations

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In general, an employee retains reemployment rights if his or her uniformed service during the employment relationship totals no more than five years. At the end of his or her service period, the employee is required to either report to work or submit a timely application for reemployment to his or her pre-service employer, depending on the length of his or her service. There are only three circumstances in which an employer may be excused from its obligation to reemploy the employee: 1) where the employer's circumstances have changed so much that reinstatement of the employee is impossible or unreasonable; 2) where assisting the employee in becoming qualified for reemployment imposes an undue hardship on the employer; or 3) where the employee's position was for a brief, non-recurrent period with no reasonable expectation that the employment would continue indefinitely or for a significant period.

Subpart D reiterates that an employer must consider an employee who is on military leave as being on a leave of absence. Thus, the employee is entitled to all non-seniority rights and benefits that an employer generally provides to other employees with similar seniority, status, and pay that are on leave of absence, as well as all non-seniority rights and benefits that an employer provides to similarly-situated employees pursuant to company policy. The regulations also grant employees absent due to service obligations for more than 31 days COBRA-like continuation of health care benefits for up to 24 months.

Subpart E describes with particularity the reemployment rights of eligible employees. An employer must promptly, e.g. as soon as practicable, re-employ an eligible employee who returns from a period of service. Moreover, an employer must reemploy an employee in a position that reflects with reasonable certainty the pay, benefits, and seniority that he or she *would have attained* if not for the period of service. The employee also is entitled to the seniority rights and benefits that he or she would have been reasonably certain to attain if he or she had remained continuously employed.

USERRA also provides returning employees with protection from discharge. Thus, an employer cannot terminate a reemployed service member *except for cause*, for a period of time based on the length of service. USERRA defines "for cause" as reasons related to either the employee's conduct or other legitimate nondiscriminatory reasons.

As demonstrated above, employers will want to review their policies and procedures to reflect USERRA's new regulations. Such preventative policies will ensure compliance with USERRA, and avoid costly litigation.

**Ryan L. Long is the newest member of Zashin & Rich's Employment and Labor Department. For information on USERRA or other labor and employment law inquiries, please contact Ryan at rll@zrlaw.com or (216) 696-4441.*

Zashin & Rich Co., L.P.A. represents individuals in all facets of domestic relations law and employers in all aspects of workplace law.

CHECK YOURSELF: Gathering the Information Necessary to Require Employees to Submit to a Medical Examination

*By: Robert W. Hartman**

The Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12101, *et seq.*, severely restricts the manner in which employers obtain and use medical information from employees. Despite these restrictions, employers may require current employees to undergo medical examinations when job-related and consistent with business necessity. As demonstrated in *Ward v. Merck & Co., Inc.*, an employer can legitimately require an employee who poses a threat to his co-workers to undergo a medical examination, if the employer properly documents the situation.

The employee in *Ward* performed his position without incident for approximately six years. In 2002, supervisors observed that the employee became socially withdrawn and his work performance began to decline. The next year, local police had to be called to Merck's worksite because the employee "backed himself up against the food tables" in the cafeteria and "was screaming at people, telling them not to eat any of the vegetables."

Following this incident, the employee returned to work but maintained a "catatonic" demeanor. Indeed, co-workers complained that this employee's behavior was frightening, and co-workers were uncomfortable working around the employee. As a result, the employer requested that this employee submit to a medical examination to determine if he was capable of performing his job duties. The employee refused to submit to an examination and was subsequently fired. The employee then filed a lawsuit alleging that his former employer violated the ADA by requiring him to submit to a medical examination.

The Court held that the employer's request that the employee undergo a medical examination did not violate the ADA. In doing so, the Court stated the general rule that medical examinations are permitted only to the extent that they are job-related and consistent with business necessity. Citing to EEOC regulations, the Court stated that an examination is acceptable if the employer "has a reasonable belief based on objective evidence, that: (1) an employee's ability to perform essential job functions will be impaired by a medical condition; or (2) an employee will pose a direct threat due to a medical condition."

Applied to the facts at hand, the Court held that the employee's behavior posed a direct threat to himself and a direct threat to other employees. Specifically, the Court cited anecdotal evidence gathered by the employer which indicated that co-workers were frightened to work with this employee and were concerned for their safety. Moreover, co-workers and management expressed concerns about the employee's own safety. In addition, a significant decline in work performance accompanied the changes in the employee's behavior. As a result, the employer's decision to require a medical examination of this employee did not violate the ADA.

As demonstrated by *Ward*, employers must plan and document prior to requesting an existing employee to take a medical examination. In such cases, the ADA places the burden on the employer to establish that the medical examination is job-related and consistent with business necessity. To satisfy this burden, the employer should collect evidence demonstrating that either the employee 1) cannot perform the functions of his job or 2) presents a direct threat to himself or coworkers. With respect to performance, employers must instruct supervisors to review employee performance accurately. In the event that an employee potentially presents a direct threat to himself/herself or other employees, employers must document the incidents which lead to this belief, and make an attempt to corroborate this belief.

By possessing comprehensive documentation, an employer will be in a better position to convince a court that its requested medical examination was job-related and consistent with business necessity. In this manner, employers satisfy their obligations under the ADA while ensuring a safe and productive work environment.

**Robert W. Hartman practices in all areas of employment and labor law. For more advice the ADA, or other labor and employment law inquiries, please contact Rob at rwh@zrlaw.com or (216) 696-4441.*

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COBRA ADMINISTRATION: Clarity = Bliss

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refund of that amount so that the employee would receive the benefit of his April 1-15 health coverage at the proper price of $86.89. The court also awarded the employee legal fees and costs, noting that the company offered no convincing explanation as to why they refused to timely pay the insurance premium, and that the employee should not, in any event, be penalized for the company's failure to abide by the terms of the plan.

At least in this case, the employer was out of the loop. To avoid a similar situation, make sure that the "COBRA person" at your company sticks to the cardinal rule: *abide by the plan.* Ensure that COBRA notices and other paperwork are forwarded expeditiously to the proper parties and that premium payments are applied accurately. Finally, keep the lines of communication open, especially if the company has made a mistake. The employer in this case had a chance to work things out before heading to court and blew it. In most cases, all employees really want is health insurance, not a battle in court.

**Helena Oroz practices in all areas of employment law and compliance issues. For more information about how to apply premium payments or other COBRA issues, please contact Helena at (216) 696-4441 or hjo@zrlaw.com.*

Zashin & Rich Co., L.P.A. represents individuals in all facets of domestic relations law and employers in all aspects of workplace law.