

EMPLOYER OBLIGATIONS TO EMPLOYEES RETURNING FROM MILITARY LEAVE

By Howard A. Vex, Esq.

In this era of increasing uncertainty, more and more employers must grapple with the extended leaves of employees that are called into military service. In this regard, the Uniformed Services Employment and Reemployment Rights Act ("USERRA") provides strong reemployment protections to employees who take leave for military service. Under USERRA, employees called into service are entitled to return to their job, with accrued seniority, pension and benefits.

The USERRA reemployment protections generally do not depend on the timing, frequency, duration, or nature of an individual's service, so long as the basic eligibility criteria are met. Moreover, an employer's reemployment obligations continue for military service that extends up to 5 full years. The USERRA obligations are applied to both involuntary and voluntary military service, during wartime and peacetime, and to virtually all public and private sector employers, regardless of size.

Employees are eligible for USERRA protections when they take leave from work to perform virtually any form of military service, including, but not limited to, the following:

- Active duty (including Reserve and Guard members);
- Active and inactive duty for training; and
- Full-time National Guard duty.

With respect to continuation of health insurance and other benefits, employees who take

leave to perform military service or training of more than 30 days may elect to continue their health coverage for up to 24 months. The employer is permitted to charge the employee up to 102% of the full premium. For military service or training of 30 days or less, any employer-paid health care coverage must be maintained. To the extent that an employer offers other fringe benefits, such as life insurance coverage, company-wide bonuses or pension contributions, the employer is generally required to offer the continuation of those benefits in an equivalent manner to that provided to other employees on other types of approved leave. Furthermore, with respect to benefits that are based upon seniority or length of service, the general rule provides that employers must treat employees returning from military leave as if there had been no actual break in service time.

USERRA additionally mandates that employees returning from military service of less than 91 days in duration are entitled to the job they left or any new position they would have been promoted or transferred to absent the military leave. For periods of service of 91 days or more, the employer must either return the employee to the position that they left or would have been attained absent the leave or, alternatively, to a position of "like seniority, status and pay" for which the employee is qualified. Where employees have been on leave for an extended period of many months or years, their job skills

may no longer match the employer's needs. Under such circumstances, USERRA affirmatively requires the employer to make "reasonable efforts" to qualify that employee for an appropriate position.

USERRA further provides that employees returning from military leaves of more than 30 days, including traditionally "at-will" employees, may only be terminated "for cause" for a period of up to a full year following their return to work, depending upon their length of service. Following expiration of the applicable time period, the employee's status may revert back to "at-will" employment. Employers are also cautioned that USERRA has also established very strong anti-discrimination and anti-retaliation protections for employees who have performed military service.

The lesson to be taken from this article is that employers should tread very carefully when addressing these issues and, where questions arise, the appropriate human resource or legal professional should be involved. An ounce of prevention is often worth a pound of cure! Of course, no matter how careful you are with your employees, they can still initiate litigation, even if their claims are without merit. Indeed, even the best employers can no longer afford to simply ignore the litigation threat and should take all reasonable steps to protect themselves. ♦

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DOES THE ADA APPLY TO WEBSITES?

By Amanda L. Mulvaney, Esq.

Recently a federal trial court became the first court to find that a commercial website must be accessible to the disabled, and to blind customers in particular, because of the prohibition against disability discrimination by places of public accommodation contained in the Americans with Disabilities Act (ADA). Whether the retailer would, in fact, be liable on the particular facts of the case remained to be decided, but the court declined to dismiss the class action complaint.

Requiring businesses to make their websites fully accessible by the blind will likely involve adding computer code for "alternative text" that permits screen-reading software used by blind individuals to vocalize the text and describe the contents of the webpage. Using this code when the site is initially designed is less expensive than retrofitting a website later.

The retailer argued to no avail that the demands of the ADA do not apply, because a

website, since it is not really a physical place at all, is not a "place of public accommodation" within the meaning of the ADA. The court reasoned that the ADA requires full and equal enjoyment of the services "of" any place of public accommodation, not services "in" a place of public accommodation. The ADA is not only about physical access to places.

The court found that the retailer's many brick-and-mortar stores constituted the "places" of public accommodation. The retailer's website serves as a "gateway" to such stores, especially for blind customers. If the website is not fully accessible to them, it impedes those customers from coming through the gateway, that is, from having the "full and equal enjoyment" of the stores' goods and services that the ADA mandates. The court drew an analogy to a case in which a telephone screening process for prospective contestants for a television game show violat-

ed the ADA by discriminating against the hearing disabled, even though the discrimination took place away from the studio where the show was produced.

Although the decision broke new ground in ADA jurisprudence, the court's "gateway" reasoning relied on the connection between the business's website and its many retail stores. The court did not have occasion to address the variation on the same issue posed by the websites of retailers who have no brick-and-mortar stores. Such a situation presents a closer question as to whether the ADA applies. For a website-only business to come within the ADA, a court would have to find that a "place of public accommodation" does not have to include a physical place at all, but can, instead, be the virtual world in which website transactions occur. ♦

"HOURS OF SERVICE" UNDER THE FMLA

By James F. Moscagiuri, Esq.

To be eligible for leave under the federal Family and Medical Leave Act (FMLA), an employee must have been employed by the employer for the preceding 12 months, and the employee must have put in at least 1,250 "hours of service" during that time. Neither the FMLA nor the Fair Labor Standards Act (FLSA) defines "hours of service."

When a hospital determined that a nurse it employed was about seven hours short of the 1,250 hours threshold, and therefore denied the nurse FMLA leave in connection with her surgery for carpal tunnel syndrome, the circumstances required a federal appellate court to construe the proper meaning of "hours of service."

Both sides agreed that, in terms of actual hours spent on the job, the nurse came up just short of the FMLA threshold. But the facts were not that cut and dried. Under a "Weekender"

compensation program devised by the hospital to provide an incentive for nurses to work undesirable weekend shifts, for every two-week period during which the nurse worked 48 weekend hours, she was paid as if she had worked 68 hours instead. If the hospital had calculated the nurse's hours in her first year using the "bonus hours" in addition to the hours the nurse was at work, she would have been eligible for FMLA leave.

The court upheld the hospital's decision and declined to find it liable under the FMLA. While the legislation itself provided little guidance for the court, an FMLA regulation on the subject of the requirement of 1,250 hours does state that "[a]ny accurate accounting of actual hours worked under FLSA's principles may be used." Another regulation states that "all hours are hours worked which the employee is required to give his employer." In this case, the

court reasoned that the bonus hours for which the nurse received extra compensation could not count as "hours of service" because she was not required to "give" them to her employer, but rather could spend that time for her own purposes.

The nurse argued to no avail that her case should have had the same outcome as another case decided by the same court, in which the court held that an employee's "hours of service" under the FMLA did include some hours not actually worked. In that case, however, the employee requested FMLA leave after successfully suing for wrongful termination and obtaining a remedy that included full service credit and back pay for the hours she would have worked but for the termination. Thus, the employee could use these hours that would have been worked in calculating FMLA eligibility. ♦

ZONING LAWS AND THE EXERCISE OF RELIGION

By Michael S. Selvaggi, Esq.

The federal Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA) provides that the government may not implement a land use regulation in a manner that imposes a substantial burden on the religious exercise of a person, including a religious assembly or institution, unless the government demonstrates two things: that imposition of the burden on that person, assembly, or institution is both in furtherance of a compelling governmental interest, and is the least restrictive means of furthering that interest.

In applying the standards of the Act, courts have held that various activities, whether or not central to an individual's belief system, are a "religious exercise" within the meaning of the RLUIPA. If individuals are forced to modify the religious exercise, courts have tended to find that the governmental regulation has created a substantial burden within the meaning of the Act. Nevertheless, where an individual is still left with the ability to choose another method that will not seriously affect the religious practice, or the action taken only tangentially impacts the religious exercise, courts have held that there is no substantial burden.

Compelling Interest?

In deciding whether or not to uphold the governmental regulation, courts have analyzed the interest the governmental unit had in creating the regulation to see if it is a compelling one. For example, significant health and safety considerations may be found to be compelling public interests. Even a finding of a compelling interest does not end the analysis. The regulation employed must be the least restrictive means to meet that interest, as required by the Act.

The governmental entity may change its regulations to alleviate the burden on religious exercise and thereby avoid the prohibitory effects of the Act. For example, the government may escape the prohibitions by retaining most of its land use policies or practices, but adding exemptions for applications that substantially burden the exercise of religion. In addition, the RLUIPA will not apply in the first place if the governmental unit acted pursuant to some authority other than a law on zoning or the designation of landmarks.

In the Courts

A recent case demonstrates that it is not enough to invoke the protections of the RLUIPA that a proposed land use is connected in some way with a church or religious group. A church brought an action under the RLUIPA challenging a municipality's refusal to permit it to operate a day-care facility with a component of religious instruction in a low-density residential neighborhood.

According to the federal court that decided the case, the RLUIPA does not require the religious activity that was substantially burdened by the land use regulation at issue to be "fundamental" to a religion. Still, the church's claim failed because the jury found that the church did not prove that it was engaged in a "sincere exercise of religion" in seeking a variance to operate the day-care center.

The church's case was hurt by its bishop's admissions, in a letter responding to the church pastor's request for help, that the day-care center appeared to be more of a traditional commercial venture and less of a religious function. ❖

WHAT HAPPENS TO YOUR E-MAIL AFTER YOU DIE?

By Jason P. Gratt, Esq.

When a young Marine died in Iraq and his parents wanted to retrieve his e-mail as a memorial to him, they came up against the privacy policy of the Internet service provider (ISP), which declined to provide the information. Ultimately, a probate court ordered that the parents be allowed to retrieve the e-mails. When a prominent poet died without leaving the password for his e-mail account, where he kept virtually every significant piece of personal information, his daughter had no means of gaining access to that information so that she could notify others of her father's death. Citing privacy concerns, the ISP for the account refused to divulge the information to the daughter.

These real-life stories are the leading edge of what may become a wave of litigation con-

cerning ownership of e-mail information upon the death of the account holder. Most of us think of e-mail as the modern equivalent of a box of letters belonging to us, when, technically, e-mail is an intangible form of property owned by the ISP. It will be some time before legislatures and courts catch up with the reality that millions of people use their e-mail accounts as repositories for all sorts of information having sentimental, historical, or economic value. In the meantime, there is some practical advice for facilitating access to e-mail information "left behind":

- Read your ISP's privacy policy to determine what your survivors may have to contend with to get access to your e-mails.

- As strange as it may sound, consider dealing directly with the issue in your estate planning by including e-mails specifically in your will, especially if they have monetary value. In connection with this, you should archive the information to your hard drive and be sure that your survivors have any necessary passwords. Conversely, if you want to take your e-mails with you, in effect, stipulate in your will that no one is to have access to your account.
- Get good legal advice, including information as to whether there are any new laws on the subject. New legislation could affect arrangements you have made or may be considering for disposing of your e-mails after your death. ❖

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New York Office

Andrew W. Bongiorno
Michael W. Rosati
Marisela S. Ross

1001 Route 517

Hackettstown, NJ 07840

Tel. (908) 852-2600 • Fax (908) 852-8225

172 West State Street

Trenton, NJ 08608

Tel. (609) 656-1330 • Fax (609) 393-1990

23 Cattano Ave.

at Chancery Square

Morristown, NJ 07960

Tel. (973) 285-1281

48 Trinity Street

Newton, NJ 07860

Tel. (973) 875-0046

200 Madison Avenue

New York, NY 10016

Tel. (212) 576-1172

PEOPLE IN THE NEWS

ANTHONY J. ZARILLO, JR. attended the Federation of Defense and Corporate Counsel's annual meeting in Sun Valley, Idaho in July 2007. At the conference, Mr. Zarillo was a presenter at a section meeting addressing how and when to use expert witnesses in insurance bad faith cases. As part of his presentation, Mr. Zarillo prepared a paper entitled "Insurance Industry Expert Testimony -- Is It a Legal Conclusion or Custom and Practice?" Mr. Zarillo, a FDCC member, has been informed that his paper was selected for inclusion in a future edition of the FDCC's scholarly publication, the FDCC Quarterly. FDCC members are experienced attorneys in private practice, who devote a majority of their practice to the representation of insurance companies, associations or other corporations, in the defense of civil litigation, as well as general counsel and insurance claims executives from throughout the world.

JOHN J. ABROMITIS has been appointed to the Board of Trustees of the Warren County Bar Association. He was also recently named to the "Top 40 Under 40" by The New Jersey Law Journal, which recognizes the achievements of 40 lawyers in New Jersey under the age of 40. The Law Journal considered various criteria in selecting the "40 Under 40," including career achievement, credentials, community involvement, pro bono work, cases of significance, and the like. His accomplishments were also recently acknowledged in an article which appeared in The Express-Times.

HOWARD A. VEX conducted a training seminar on October 12, 2007 for the members of the Warren County Regional Chamber of Commerce entitled: "Resolving Employee Discrimination and harassment Complaints Internally." The seminar went far beyond the usual description of prohibited behaviors and, instead, focused on employer best practices for the handling of such complaints, including the critical internal investigation process. When such complaints are handled properly and professionally, they can often be resolved internally, avoiding costly and demoralizing litigation. Mr. Vex presented a similar training seminar for the Morris/Sussex/Warren Employer Council in June of 2007 and regularly conducts employment training for our corporate and public sector clients.

Actual resolution of legal issues depends upon many factors, including variations of facts and state laws. This newsletter is not intended to provide legal advice on specific subjects, but rather to provide insight into legal developments and issues. The reader should always consult with legal counsel before taking action on matters covered by this newsletter.

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Hackettstown, New Jersey 07840
1001 Route 517
Courter, Kobert & Cohen, P.C.

