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MILITARY LEAVE – WHAT TO DO WHEN JOHNNY/JULIE COMES MARCHING HOME?

With an expeditious resolution of American military involvement in Iraq becoming more likely, employers undoubtedly will be faced with the prospect of welcoming back those employees called up to active duty because of the war. Knowledge of the Uniformed Services Employment & Reemployment Rights Act (USERRA) is critical to handling the various reinstatement issues that may arise.



USERRA is a federal law that will take precedence over any similar state laws, to the extent that that state law does not provide greater benefits to employees. While California law generally prohibits discrimination against veterans who seek to return to their prior employment, most military leave statutes in California deal with public employees. This article will focus on service persons returning to private employment and the application of USERRA.

Does it apply to my company? USERRA applies to all employers regardless of size.

What is its purpose? USERRA is an anti-discrimination law and, as such, is designed to return employees to the same position that they would have been in had they not been called to active duty. Employers will be considered to have discriminated against a returning service person if that person's service or obligation for service is "a motivating factor in the employer's action, unless the employer can prove that the action would have been taken in the absence of such membership . . ." (38 U.S.C. § 4311(c)(1).)

What must my company do when the leave is over? The most significant benefit of the USERRA is the service person's entitlement to reemployment rights and benefits. In general, USERRA applies when a person has given advance written or verbal notice (where reasonably possible) of the service that causes the absence, when the length of the absence does not exceed five years and when the service person timely submits an application for reemployment upon his or her return.

The service person must be returned to his/her former position, or, if that position is no longer available, to a position of like seniority, status and pay. The USERRA reemployment provisions also apply to people who are disabled or have a disability aggravated during the service.

Returning service persons should be considered as having the same seniority and benefits as if they had not gone on leave. In addition, employers who offer health plans are required to offer continuation of coverage for up to 18 months and cannot charge any more than 102% of the premium charged to a non-military employee.



Are there any exceptions? Exceptions to reemployment apply if, in the case of disability, reemployment would impose an undue hardship on the employer. This “undue hardship” exception is dependent upon the nature and cost of reemployment, the overall financial resources of the employer, number of persons employed, etc. A general exception exists as to all persons if the employer’s circumstances have “so changed as to make such reemployment impossible or unreasonable...” (38 U.S.C. § 4312(d)(1)(A).) The “impossible or unreasonable” standard is not defined in the statute.

What if my company doesn't comply? Violations of USERRA can result in payment of back pay, benefits and reinstatement. If the violations are “willful,” liquidated damages equal to the monetary damages can also be awarded. Finally, employers are subject to paying the employee’s attorneys fees and costs if an employee wins an enforcement action.

For small businesses which lose key employees to active duty, the Small Business Administration administers a “Military Reservist Economic Injury Disaster Loan Program” to make the sacrifices of such employers as painless as possible.

APPLYING THE BREAKS

We have been receiving many inquiries about meal and rest period requirements in California. This is at least in part due to the noted increase in Labor Commissioner claims, lawsuits and class actions relating to such requirements, which is a result of the relatively recent imposition of a monetary penalty for those employers who fail to comply. You must know and implement these requirements. Wide spread violations can be costly.

By statute and in nearly all industry wage orders, an employer must provide meal and rest periods to non-exempt employees as follows:

The Meal Period

- A 30-minute meal period must be provided when an employee works more than five hours per day. An employee is entitled to a meal period during each 5 hour work period. The 5 hour work period begins to run at the start of a shift and again as soon as an employee returns from a meal period.



- The meal period can be waived by both the employer and the employee if the total work period is six hours or less.
- If an employee works for more than 10 hours per day, the employee must provide a second 30-minute meal period.
- If an employee works 12 hours or less in the day, the second meal period may be waived by both the employer and the employee, but only if the first meal period was not waived.
- An employer has an affirmative obligation to ensure that its employees actually take the required 30-minute (or longer) off-duty meal period.
- During the meal period, the employee must be relieved of all duty and responsibility and must be able to leave the premises.
- There is a very narrow exception, wherein employees, upon a specific written agreement,

can have an “on duty” meal period when the nature of the work prevents an employee from being relieved of all duty. The specific test for an “on-duty meal period” considers a number of factors, which must support the conclusion that the nature of the work makes it “virtually impossible” for the employer to provide the employee with an off-duty meal period. In such cases, the meal period is considered “hours worked” and must be paid.

- A failure to provide a proper meal period will result in a penalty of one hour pay for each workday the meal period was not provided.

Rest Periods

- Employees must be provided a net 10-minute continuous and duty-free rest period for every four hours worked or major fraction thereof (i.e., any time more than two hours). A rest period is not required for employees whose total daily work time is less than three and one-half hours.
- Rest periods shall be included as hours worked and there shall be no deduction from the employees’ wages for rest periods.
- Where practicable, rest periods shall be taken in the middle of each work period.
- As a general matter for a typical full day of work, the first rest period should be taken before the meal period and the second rest period should come after the meal period.
- A rest period must be preceded and followed by some work. An employer cannot provide the ten minute rest period at the end of the day to allow an employee to leave work 10 minutes early.
- Absent exceptional and specific circumstances, an employer cannot offer a combined 20 minute break period instead of two 10-minute breaks.
- The scheduling of rest periods need not be fixed, but can alter day-to-day.
- Most wage orders require the employer to provide a suitable and available resting facility in an area separate from the restrooms.
- Unlike the employer’s affirmative obligations to ensure for a meal period, the employer need only



authorize and permit all employees to take rest periods. An employer will not be penalized if the employee freely chooses without coercion or encouragement to forego or waive a rest period.

- There is a very narrow exception wherein an employer is not required to provide a rest period when the disruption of a continuous operation would jeopardize the product or process of the work.
- The penalty for violating the rest period requirement is one hour of pay per day.

CALIFORNIA DISABILITY LAW APPLIES RETROACTIVELY

The Decision

In *Colmenares v. Braemar Country Club*, the California Supreme Court recently confirmed the new statutory language that a covered disability under the state’s Fair Employment and Housing Act (FEHA) only requires a *limitation* upon a major life activity, not the “substantial” limitations required by federal law. The court then held that the *new standard should be applied retroactively to disability discrimination claims occurring prior to the recent amendment to the FEHA*. Interestingly, the *Colmenares* court found that California has *always* followed the more lenient standard and that the recent amendments merely confirmed that.



Practical Tips:

1. Employers must engage in an interactive process and make best efforts to find effective reasonable accommodations for employees suffering from any level of limitation of a major life activity.
2. Employers need to re-evaluate their positions taken with respect to ongoing issues involving potentially covered employees to assure compliance with California law.
3. Employers with out-of-state HR personnel should alert those personnel to this change and have them revise any written materials relying on the federal standards to reflect the broader California definition.

PLANNING FOR AN EMERGENCY

Plan ahead and plan for the worst. In keeping with that adage, the Occupational Safety and Health Administration (OSHA) requires most facilities with more than ten employees to have a written emergency plan. In smaller facilities, the plan can be communicated orally. At a minimum, the emergency plan must include the following provisions.



1. Emergency escape procedures and emergency escape route assignments.
2. Procedures to be followed by those employees who are assigned to remain to perform (or shut down) critical plant operations before the plant is evacuated.
3. Procedures to account for all employees after emergency evacuation has been completed.
4. Rescue and medical duties for assigned employees.
5. The preferred means for reporting fires and other emergencies.
6. Names or regular job titles of persons or departments to be contacted for further information or explanation of duties under the plan.

In buildings with several businesses, employers are encouraged to coordinate their plans with the other employers in the building. A building-wide or standardized plan for the whole building is acceptable provided that the employers inform their own employees of their duties and responsibilities under the plan.

Simply creating a plan is not enough. Employers must also ensure that the plan is properly implemented. In order for the plan to be successful, the employer must assure that every employee knows the details of the emergency action plan. Training must be conducted when the plan is initially created, when new employees are hired, and at least annually. Additional training is necessary when new equipment, materials, or processes are introduced, when

procedures have been updated or revised, or when exercises show that employee performance is inadequate. Drills should be held at random intervals, at least annually.

There are public and private agencies that provide information and assistance services for developing your company's safety plan. In addition to these resources, you should also consult your attorney to ensure that your emergency plan satisfies OSHA's standards.

NO WORKERS' COMPENSATION BENEFITS FOR A PSYCHIATRIC INJURY CAUSED BY A GOOD FAITH INVESTIGATION OF A DISCRIMINATION CLAIM

Can an employee recover benefits for a psychiatric injury arising from an investigation of race discrimination charges brought against him? No, said a recent court, as long as the investigation is undertaken in good faith. In *Northrop Grumman v. Workers' Compensation Appeals Board*, 103 Cal.App.4th 1021, the California Court of Appeal affirmed that an employer is entitled to statutory protection for employee psychiatric claims arising from good faith personnel decisions, including investigations into discrimination allegations.

In *Northrop*, a Caucasian employee of Northrop Grumman Corp. was accused of discrimination by an African American employee. The investigation revealed that the employee had engaged in practices that violated the company's policies, but it was inconclusive regarding any racial motivation. The employee sought workers' compensation benefits for psychiatric injuries attributed to the investigation and subsequent treatment.

The appellate court reversed a Workers' Compensation Appeals Board decision awarding the employee benefits, because the investigation was undertaken in good faith. It emphasized that the employer was obligated to investigate the claim of discrimination, and that good faith personnel decisions, such as the decision to undertake an investigation in response to a claim, are protected. Under Labor Code section 3208.3, an employee is not entitled to compensation for a psychiatric injury substantially caused (35 to 40 percent) by a lawful, nondiscriminatory, good faith personnel action. This rule now protects an employer that takes

reasonable steps to investigate and protect against discrimination and harassment. To be in good faith, a personnel decision must be done in a fashion that “is lacking outrageous conduct, is honest and with a sincere purpose, is without an intent to mislead, deceive, or defraud, and is without collusion or unlawful design.”

PREFERENTIAL TREATMENT RESULTING FROM A CONSENSUAL RELATIONSHIP BETWEEN A SUPERVISOR AND EMPLOYEE DOES NOT CREATE A HOSTILE WORK ENVIRONMENT

Consensual inter-office romances that lead to preferential treatment do not automatically create a hostile work environment. So held the Court of Appeal in the recent case of *Mackey v. Department of Corrections* (2003) 105 Cal.App.4th 945. In *Mackey*, the plaintiffs were female employees of a correctional facility who complained of unfair treatment arising from the male prison warden's affairs with three or more female co-employees. The plaintiffs alleged that these employees received preferential treatment, while they were harassed and retaliated against for complaining of the preferential treatment.

The *Mackey* court concluded that the plaintiffs' claims ultimately pertained only to non-actionable unfair treatment and upheld summary judgment. The court noted that a sexual harassment claim may arise from a non-consensual affair or a work place environment where an employee is treated less favorably because of his or her refusal to participate in sexual activities. However, the court concluded the plaintiffs could not establish either discrimination or a hostile work environment because they could not show that the relationships at issue were non-consensual or that they were treated differently from any male employees. The court emphasized that mere unfair treatment, unrelated to an employee's gender, will not give rise to a discrimination or harassment claim. Similarly, a retaliation claim cannot arise from complaints of mere unfair treatment.

Practical Note:

While consensual interoffice romances were held not to violate discrimination laws, they may violate your company's conflict of interest policies in some situations. They can also create the risk of later claims of coercion or sexual harassment after a relationship ends badly. Make sure that supervisors and managers are not allowed to exercise authority over persons with whom they are involved in a consensual romantic relationship.



REASONABLE ACCOMMODATION UPDATE: TELEWORK



In today's demanding workplace, the careful balancing of family time and financial responsibilities can be quite delicate. However, due to rapid advances in technology and communication systems, many employers and employees alike have ventured into the realm of telework a.k.a. telecommuting. But does telework have a place in your company when considered as a means of reasonable accommodation to employees with disabilities?

The short answer is: consider each request on a case-by-case basis.

The EEOC recently released a “Telework Fact Sheet” (TFS) to help guide employers when telework is considered as a reasonable accommodation under the ADA. The TFS explains the ways that employers may use existing telework programs or allow an individual to work at home as a reasonable accommodation.

Remember, not all persons with disabilities need (or want) to work at home and not all jobs can be performed at home. However, allowing an employee to work at home may be a reasonable accommodation when the employee's disability prevents successful job performance at the place of employment and the job, or parts of the job, can

be performed at home without causing significant difficulty or expense to the employer.

That being said, many questions arise when considering telework as a reasonable accommodation and the TFS may be used for guidance. The following are the answers the EEOC provided to the following questions:

1. Does the ADA require employers to have telework programs?

No. The ADA does not require an employer to offer a telework program to all employees. However, if an employer does offer telework, it must allow employees with disabilities an equal opportunity to participate in such a program, which might include modifying the program for someone with a disability.

2. How should an employer determine whether someone may need to work at home as a reasonable accommodation?

This determination should be made through the flexible "interactive process" between the employer and the individual. An employer and employee first need to identify and review all of the essential job functions and determine if those functions can be performed at home. An employer does not have to remove any essential job duties to permit an employee to work at home. However, it may need to reassign some minor job duties or marginal functions if they cannot be performed outside the workplace and they are the only obstacle to permitting an employee to work at home.

Conclusion

HR professionals should be familiar with their company policies on telework and be sure to treat employees equally and lawfully within the policies. Special attention must also be given to ensuring that all employees with known disabilities are engaged in a thoughtful and comprehensive interactive process to determine what reasonable accommodations can be made for the disabled employee that will work within the business objectives and limitations of the company. Consideration should be given to telework within the guidelines set forth above.

ARBITRATION UPDATE



Arbitration continues to be a useful dispute resolution mechanism for employers and employees alike. The following is a brief update on the forever evolving federal and state law relating to the enforceability

of arbitration agreements in the employment context.

Today, California courts will enforce employer-imposed arbitration agreements if the agreement contains procedural and substantive protections to ensure fairness, and if the agreement is not one-sided. To that end, employers with an existing arbitration program, or those contemplating imposing one, should make sure that the agreement complies with the guidelines set forth by the California Supreme Court in *Armendariz v. Foundation Health PsychCare Services, Inc.*, 24 Cal.4th 83 (2002). Arbitration agreements that do not comport with *Armendariz* are those that do the following: (1) require the employee to share the costs of arbitration; (2) provide for no judicial review; (3) limit discovery; (4) limit the remedies available to the employee; and (5) lack mutuality of remedies to employer and employee.

In *Little v. Auto Stiegler, Inc.*, Cal.4th (No. S101435. Feb. 27, 2003), the California Supreme Court recently held that the requirements set forth in *Armendariz* are not limited to when statutory claims, like discrimination, are involved, but apply with equal force to mandatory arbitration of non-statutory claims, like wrongful termination in violation of public policy.

In light of the above, employers should consider the following when drafting their arbitration agreement:

- Avoid language that it is unbalanced and one-sided.
- List with specificity the claims that will be covered by the arbitration agreement. According to *Renteria v. Prudential Ins. Co. of America*, 113 F. 3d 1104 (9th Cir. 1997), an arbitration provision will not be enforced if the language of the agreement does not clearly put an employee on notice as the nature of the claims he or she is required to arbitrate.

- Do not eliminate significant benefits or remedies which the employee would otherwise have in court. Common areas where the restrictions on remedies risk compromising the enforceability of the agreement are:
 - § Significantly reducing the period in which the employee can bring a claim under the agreement.
 - § Forcing the employee to share equally in the costs associated with the arbitration.
 - § Failing to provide for judicial review.
 - § Limiting damages.
- Make sure the employee knowingly waives his or her right to trial and have the employee sign a statement to that effect, as part of a stand-alone document. In addition, the arbitration policy should be published in the employee handbook to ensure that the employee is aware of the policy.
- Do not delay arbitration or take actions which are inconsistent with the intent to arbitrate.
- Do not misrepresent the arbitration process and be sure to comply with the provisions of



your agreement.

Introducing an arbitration agreement to existing employees is more complicated. The employer must be careful to provide adequate consideration to the employee. In other words, the employer runs a risk by simply asking the employee to sign the agreement or be fired. The company could, however, present the agreement during an annual review with a pay raise, increase the balance of paid time off days or increase the amount of vacation accrual in consideration for an existing employee signing an arbitration agreement.

While these guidelines provide a company with tools to consider and draft an arbitration agreement, given the rapid changes in the laws surrounding arbitration agreements, it is essential that the company discuss its options with legal counsel before distributing an arbitration agreement to its employees.

What's to Come?

The Ninth Circuit Court of Appeals recently decided to have all of the Ninth Circuit judges rehear the case of *Equal Employment Opportunity Commission v. Luce, Forward, Hamilton & Scripps* (9th Cir.)



September 3, 2002, which held that an employer could make the signing of an enforceable arbitration agreement a condition of employment.

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