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NAVIGATING THE MINEFIELD OF MILITARY LEAVE

By Jonathan T. Stender

Now that the United States has won the war in Iraq, many employers may be expecting their military reservist employees to quickly return to work. But while the actual fighting may be over, the President has indicated that the military's work in Iraq is likely to continue for some time. This means military reservists and members of National Guard may remain on active duty for months. Similarly, as the war on terror continues here at home, we could see more and more reservists deployed in this country and remaining active for lengthy periods.

So it is just as important as ever for employers to become familiar with the federal law governing reservists and National Guard troops called up to active duty.

Many employers know that the Uniformed Services Employment and Reemployment Rights Act provides that when an employee returns from active service, she or he must be rehired to the same or a comparable position. But the law is more complicated than that, and most employers have many questions about how it applies. Here are some answers to basic questions about the law.

First, how long must you hold a position for an employee called up to active duty? Many employers are surprised to learn that the answer is up to five years. Of course, you aren't expected to keep a job vacant during this time; you are free to hire a fill-in worker. But when the reservist returns, you must rehire him. Further, significantly, the law applies to employers regardless of how many employees they have.

What if it is impossible to rehire the reservist? There are some exceptions to the rule about rehiring, but they are difficult to meet. You must show that your "circumstances have so changed as to make such re-employment impossible or unreasonable," or that "such employment would impose an undue hardship"

continued on back page

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This publication is intended to inform clients and friends about labor and employment matters of current interest. The matters included were not given exhaustive treatments due to space limitations. This abridged information should not be construed as legal advice and is not a substitute for legal counsel. This publication is not intended to create, and receipt of it does not constitute, an attorney-client relationship.

SUMMER IS HERE — HIRING TEENS BEWARE!

By Jonathan T. Stender

Summer is finally upon us. The kids are out of school. Some will play; others will endeavor to make a buck or two, hopefully learning a thing or two on the way. If you are an employer expecting to hire teens this summer, beware of the prickly thicket of federal and state child labor laws.

First, it is important to note that with some limited exceptions, employment of persons under 14 is prohibited. Persons age 14 and 15 may work, but Ohio law restricts their summer employment to 8 hours per day, and a total of 40 hours per week. Fourteen- and 15-year-olds may not start work before 7 a.m., and their work day must end by 9 p.m.

Work hours for persons between 16 and 18 are not restricted during the summer; neither are the total number of hours they may work. However, all minors may not work more than five consecutive hours without a rest period of at least thirty minutes.

The law also restricts what kinds of work minors may perform. As a general rule, persons under 18 may not perform "hazardous" tasks. Both Ohio and federal law classify certain activities and work equipment as hazardous, although these lists are not exhaustive.

Under Ohio law, the following jobs are considered hazardous:

- Motor vehicle drivers and helpers
- Occupations in the operation of power-driven metal forming, punching and shearing machines
- Occupations in the operation of circular saws, band saws and guillotine shears
- Wrecking, demolition and ship breaking operations.

Federal law states that minors under age 18 may NOT perform any work in:

- Wrecking or demolition operations
- Roofing
- Excavating
- Mining or logging

Under federal law, minors also are forbidden from operating ANY power-driven equipment, including, but not limited to, punch presses, saws, meat slicers and bakery/food processing machines.

Until 1998, all minors were forbidden from operating motor vehicles, however the law has since been relaxed to allow 17-year-olds to drive under certain conditions. Among these conditions, the minor must have a valid driver license and have no moving violations on his driving record, driving must be incidental to the job, it must occur during daylight hours, and driving is restricted to vehicles under 6,000 pounds. Some kinds of driving are still specifically excluded. These include:

- Towing of vehicles
- Route deliveries or route sales
- The transportation for hire of property, goods or passengers
- Urgent, time-sensitive deliveries
- More than two trips away from the primary place of employment for the purpose of delivering goods of the 17-year-old employee's employer to a customer (other than urgent, time-sensitive deliveries)
- More than two trips away from the primary place of employment in a single day for the purpose of transporting passengers (other than employees of the employer)
- Transporting more than three passengers (including employees of the employer)
- Driving beyond a 30-mile radius from the 17-year-old employee's place of employment

The simple rule of thumb when employing teens this summer is arm yourself with awareness of the law and knowledge of your young employees' ages. Understanding your basic obligations under state and federal child labor laws can help you and your company avoid getting severely burned by the summer heat. Contact Jon Stender at Ross, Brittain & Schonberg if you have questions regarding employing teens during the summer or any other questions relating to child labor law.

BWC SALARY CONTINUATION RULES REVISED

By Thomas J. Stefanik Jr.

The Bureau of Workers' Compensation (BWC) revised its policies regarding the payment of salary continuation. The revisions took effect on January 1, 2003.

Salary continuation occurs when the employer continues an employee's regular wages at the onset of a work-related injury. Under current guidelines, an injured worker must now receive a full check at the next scheduled time after an injury or illness occurs. (Payment of salary continuation cannot wait until a BWC/Industrial Commission determination is made.) If a claimant does not receive a scheduled paycheck on time, the employer forfeits the right to pay salary continuation in lieu of temporary total disability benefits.

Further, the employer must notify the Bureau of Workers' Compensation within seven days of an accident if they intend to pay salary continuation in lieu of temporary total. They are also required to submit a salary history at that time.

If at some point an employer decides that they no longer wish to pay salary continuation, the employer must notify the Bureau of Workers' Compensation immediately, and must notify the BWC of a return to work within 72 hours. Failure to do so may have an impact on the employer's future ability to again pay salary continuation.

Salary continuation will continue until either the claimant returns to work, the injured worker or employer terminates it, or unless the Bureau of Workers' Compensation discovers that the injured worker is not receiving his/her full wages as part of the salary continuation agreement. At that point, the Bureau will begin paying temporary total disability compensation, and a reserve will be set for the claim.

Although the injured worker has the right to refuse to receive salary continuation in lieu of temporary total disability compensation, there is an incentive for the injured worker to accept salary continuation. Temporary total disability compensation is not paid until a claim is allowed, which often involves a much longer period of time to wait for payment.

If you have any further questions regarding the appropriateness of paying salary continuation, please contact Tom Stefanik at (216) 447-1551.

self-insured [corner]

The Workers' Compensation Resource Network is an association for self-insured employers in Ohio. The purpose of the association is to provide a unique forum, opportunity and resource for the educational benefit of self-insured employers.

The Resource Network dialogues ideas, resources and information with member peers by identifying and addressing issues with which self-insured employers are faced. This includes engaging in dialogue focused on outcomes that enhance self-insured administration. Some topics thus far covered include the development and maintenance of a transitional work program, ergonomics, the importance of written job descriptions, the economic impact of business failures on self-insured employers, and medically managing claims for self-insured employers.

If you are a self-insured company, consider becoming a member of the Workers' Compensation Resource Network. Members pay no additional cost for two representatives from your company to attend regularly scheduled seminars and meetings.

Call Megan Geist at (216) 447-1551 x165 for additional information and membership details.

EMPLOYMENT LAW BREAKFAST BRIEFINGS

All Workshops:

Time: 8:30 – 10:00 a.m.

Location: 6000 Freedom Square Drive

Ground Floor Amphitheatre • Independence, Ohio
Call (216) 447-1551 to register

(No cost to RBS Clients and HRDU Members)

Best Practices in Selection and Placement
Date: June 12, 2003

Performance Management: Getting the Most Out of Your Employees
Date: September 11, 2003

HR and Legal Alerts and Updates for Employers
Date: December 11, 2003

ABC, NORTHERN OHIO CHAPTER SEMINARS

Drug Free Workplace Program Training Schedule
Dates:

June 17 or July 16, 2003, Employee Training — 8:00 to 9:00am

June 19 or July 17, 2003, Supervisor Training — 8:00 to 10:00am

Cost: Free to Participants of ABC's DFWP Program; $60.00 per attendee/Non-Participants

All training participants must register one week in advance with Jennifer at (440) 717-0389.
All training will be held at the NOCABC Training Center.

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Speakers: Evelyn P. Schonberg and David T. Andrews
June 3, 2003 • Independence, Ohio

Presented by Lorman Educational Services • Call (715) 833-3959 for more information

ADVANCED WORKERS' COMPENSATION

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"Evaluating Permanent Impairment Under the AMA Guide, Fifth Edition or State Guide"
(with Dr. Manhal Ghanma)

Speaker: Patrick J. Harrington
June 29, 2003 • Cleveland, Ohio

Presented by Sterling Education Services • Call (715) 855-0498 for more information

ATTENTION MERIT SHOP EMPLOYERS! THINKING OF GOING HOLLYWOOD? READ THIS FIRST

By David S Farkas

Nowadays, in the era of do-it-yourself film editing and hand-held video cameras, everyone's a movie producer. But as one company recently found out, nothing complicates making a movie like a union.

Our story begins way back in 1994, when Allegheny Ludlum, a Pennsylvania steel manufacturer, was involved in a battle with the United Steelworkers to keep the union out of their office personnel. (The production workers were already unionized.) Allegheny hit upon the idea of videotaping the employees to show how happy they were without the union. Employees in the video apparently were instructed to "sit at their desks, turn to the camera, smile and wave." Sounds pretty harmless, right? Not likely where a union is involved in the fray.

Some employees complained to the union that they did not want to be in the video. After the representation election, which Allegheny won by a vote of 237 to 225, the union filed charges with the NLRB. Among their allegations was this gem: the company had unlawfully interrogated the employees about their opinion on the union by individually asking employees if they wished to be in the video or not.

After considering the issue, the Administrative Law Judge (ALJ) held that the asking of employees whether they wanted to be included in the video constituted illegal polling about the employees' union sympathies or desires. The judge ordered a new election. After the Board affirmed the ALJ's decision, Allegheny appealed the decision to the U.S. District Court in Washington, D.C.

However, that court effectively ducked the central issue, namely, when and under what circumstances may an employer videotape employees for purposes of a pro-management video. The court found that the NLRB was the body properly empowered to make such determinations and, accordingly, remanded the case to the NLRB for clarification of the issue. The NLRB, in turn, came up with the following five rules:

1. The solicitation to appear in the video must be general, not personal, and must include assurances that a refusal to participate will not result in reprisal against the employee.

2. Employees shall not be pressured to decide in the presence of a supervisor.

3. There can be no other coercive conduct connected with the announcement.

4. The employer cannot create a coercive atmosphere by engaging in other forms of unfair labor practices.

5. The employer cannot extend the legitimate purpose of soliciting consent to appear in the video to seeking information about the union.

The critical rule in this case was the first one. Since Allegheny's solicitation involved a face-to-face-question as to whether the employee wished to participate or not, the court held that Allegheny violated the newly formulated rule, and ordered a new election. The company appealed this decision to the Court of Appeals in the Third Circuit, which upheld the lower court's decision.

Clearly this decision presents an important development in the high-tension arena of representation campaigns. The valuable lesson here is that simply because new rules have not been crafted to deal with emerging uses of technology does not mean that the old rules do not still apply under new circumstances. Moreover, this case reiterates the importance of good legal counsel that deal with the increasingly complex rules that apply to representation elections.

Ross, Brittain & Schonberg has experienced labor relations attorneys to help your company navigate through the thicket of representation elections. Contact Alan Ross or David Farkas for more information regarding this issue or any other labor issue or concern facing your company.

Navigating The Minefield Of Military Leave
continued from page 1

on you. The law is less than clear on how employers can meet this standard. Across-the-board downsizing or partial layoffs probably will not suffice, but elimination of the reservist's particular job might. Before telling a returning reservist that you cannot rehire him or her, it is best to consult an attorney.

What are the terms of employment when a reservist returns to work? In terms of pay and benefits, you must treat a returning reservist as if he'd never been away. In other words, if he would have received scheduled raises had he been working during the period of his service, the returning reservist is entitled to be paid as if he had earned the raises. The same is true if everyone in the company has received raises, or if pay for the reservist's position has increased.

The same is true, generally, for benefits. If the reservist would have become entitled to certain benefits by working continuously throughout the period of his active duty, he must be granted those benefits upon his return. For example, if a reservist was entitled to two weeks paid vacation at the time he left, but would have become entitled through tenure to additional vacation by the time he comes back, then he must be reinstated with that additional vacation time. How this principle applies to other benefits, such as insurance and retirement, is more complicated. You should consult your attorney or benefits manager to determine benefit levels on a case-by-case basis.

It's important that you or your company have a good understanding of your obligations under the military leave act. In past years, prior to current hostilities and terror, the Department of Labor opened over a thousand cases in which returning members of the military charged their employers with violations of the law.

As always, the application of any law is highly dependent on the particular facts at hand. Moreover, the military leave law is surprisingly complex. As often is the case in employment relations, a relatively simple matter of compliance can turn into a complicated, expensive lawsuit on the drop of a dime.

If you or your company finds itself faced with this issue, we strongly recommend contacting qualified legal counsel to make sure that you are in full compliance with the law. For more information on military leave law, contact Jon Stender at (216) 447-1551.

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