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Employment Newsletter

E-MAIL ALERTS

SUBSTANTIAL VERDICT AWARDED AGAINST MASSACHUSETTS EMPLOYER FOR FAILING TO COMPLY WITH EMPLOYEE'S RIGHT TO REEMPLOYMENT FOLLOWING MILITARY SERVICE

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The federal Uniformed Services Employment and Reemployment Rights Act ("USERRA" or the "Act") was enacted in 1994. USERRA's purpose is to protect civilian employment for those who need to be absent from work to serve in this country's uniformed services. Under the Act, an employer cannot deny initial employment, reemployment, retention, promotion, or any employment benefit on the basis of membership in the uniformed services (or application for membership, performance of service, application for service, or obligation for service. Further, an employer may not discriminate or retaliate against an employee due to the exercise of his or her rights under this law.

One of the main requirements of USERRA is that employers must place employees returning from military leave into the position they would have held if they had been continuously employed. A recent U.S. District Court decision from Massachusetts provides employers with greater clarity regarding their reemployment obligations. See Fryer v. A.S.A.P. Fire and Safety Corporation, ____ F.Supp.2d, ___, 2010 WL 286630 (D.Mass. Jan. 25, 2010).

In Fryer, the District Court of Massachusetts upheld a jury award in favor of an employee who claimed that his former employer violated USERRA by failing to reemploy him in his pre-service position, retaliating against him because of his military service, and ultimately terminating him because of his military service. The employee also alleged discriminatory and retaliatory treatment on the basis of his military service under Massachusetts state law chapter 151B. The jury awarded the plaintiff more than $436,000 in damages, including back pay ($42,234), front pay ($105,000) and emotional distress damages ($289,000).

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The plaintiff worked for A.S.A.P. Fire and Safety Corporation, Inc. ("ASAP") for a little over a year before he was ordered to active duty in the Army National Guard in May 2007. He was then deployed to Kuwait and Iraq. At the time of his deployment, the plaintiff sold and serviced sprinkler systems for his employer. In April 2008, the plaintiff notified the employer that he would be returning from duty and was looking forward to returning to work. When plaintiff stopped by work to see about starting on May 12, 2008, he was advised by his supervisor that there were no openings. His position had been filled by another individual during his leave. In late May 2008, plaintiff sent a warning letter to the employer, after consulting with the Department of Labor and Employer Support of the Guard and Reserve, advising that he planned to report to work on June 30, 2008. When he arrived at work that day, his supervisor agreed to give him a job, but the job he offered was not his pre-service position or an "escalator" position (the position he most likely would have obtained had he remained on the job and not taken a military leave), or position of like seniority, status and pay. Rather, he was offered a job as a "sprinkler helper" at a lower salary and with reduced benefits. Plaintiff accepted the position but continued to voice his objection to his treatment. In late October 2008, plaintiff was terminated for "being late for work twice and calling out sick three times all within a 30 day period." Plaintiff responded that his tardiness and absences were all due to illness and other permissible reasons, and that other employees had not been disciplined or terminated for similar conduct. Plaintiff subsequently filed suit and obtained the $436,000 verdict described above.

As service members begin to return from active duty with greater frequency over the next few years, the Fryer case provides some important lessons for employers:

- First, employers, acting through their managers, supervisors and human resource personnel, should have a basic understanding of USERRA's coverage and the employer's obligations.

- Second, employers should be aware that adverse changes to a servicemember/employee's job responsibilities, schedules, benefits, and the like, upon return from military duty, may run afoul of USERRA and related rights. Employers should avoid any such changes.

- Third, employers should understand that servicemember/ employees have a right to reinstatement to the "escalator position," that is, the job that he or should would have attained had they not been absent for military service, with the same seniority, status and play, as well as other rights and benefits determined by seniority.

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- Fourth, employers must comply with USERRA *even where the employee-service member volunteered for duty*. In Fryer, the plaintiff voluntarily enlisted in the National Guard, and the Court noted that this did not make any difference with respect to his legal rights.

- Fifth, employers are often surprised to learn that USERRA applies to all public and private employers of any size and to all applicants and employees. Further, USERRA limits the cumulative length of time that an individual may be absent from work for military duty and retain reemployment rights to **five years** (and, there are important exceptions to the five-year limit, including initial enlistments lasting more than five years, periodic National Guard and Reserve training duty, and involuntary active duty extensions and recalls, especially during a time of national emergency).

- Finally, employers must advise employees of their rights under USERRA. This requirement can be satisfied by posting notice of USERRA rights where other employee notices customarily are posted. A Poster -- "Your Rights Under USERRA" -- can be downloaded from the following link (**USERRA Poster**).

As the employer in Fryer learned the hard way, failure to comply with USERRA and related state obligations can lead to a full panoply of damages being lodged against the company, including front and back pay, compensatory damages, civil penalties, and extensive litigation costs and fees. Should you have any questions regarding an employee's military leave, please do not hesitate to contact any of the attorneys in Devine Millimet's Labor and Employment Practice Group. In addition, the Department of Labor website contains a wide range of useful information on USERRA found at the following link (**DOL USERRA site**).

The Devine, Millimet & Branch Labor, Employment and Employee Benefits Group offers this free Friday E-Mail Alert service to provide information on recent developments in labor, employment and employee benefits law. If you have any questions about this e-mail, or if you know of anyone else who may be interested in receiving these alerts, please send us an e-mail at *employment@devinemillimet.com*.

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