

LABOR & EMPLOYMENT REPORT

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Benefit Rights of Employees Who Serve in the Military

As we face the prospect of war in Iraq, employers may begin to encounter the effects of the Uniformed Services Employment and Re-employment Rights Act of 1994 ("USERRA"), a federal law that protects the employment rights of workers who are in the military reserves and National Guard. We have previously published a general description of the employee's rights during and after their service, but we thought the following information would be particularly useful in regard to maintaining those employees' benefits during active service.

INTRODUCTION

USERRA governs an employer's re-employment and benefit responsibilities to employ-

ees during military leave and upon return from that leave. The law applies to all employers and covers service (both voluntary and involuntary) in active duty or inactive training duty in the Armed Forces, including the National Guard.

BASIC FEATURES OF THE LAW

- No discrimination against employees for past, current, or future military service;
- Guaranteed leave of absence (for as long as any other leaves are granted); and
- Re-employment rights (provided application is made within prescribed periods).

BENEFIT PROTECTIONS

Health Benefits. Uniformed service members who would otherwise lose coverage are entitled to continue coverage (like COBRA) for themselves and their dependents. A maximum

102% of the entire premium (employer and employees' share) can be charged, unless the military duty is less than 31 days. In that case, the employer cannot charge more than the share of health coverage that is charged to similarly situated employees for the month. While the service person may receive health benefits known as Tricare/CHAMPUS from the government, they may often want to continue their employer-provided coverage under COBRA, especially to provide higher levels of benefits or more flexibility in medical providers to dependents. Tricare is not considered a group health plan that would stop COBRA coverage. In addition, reserve members are not covered by Tricare/CHAMPUS unless they are on active duty for at least 30 days. Because USERRA health coverage is more generous than COBRA health coverage, they run concurrently. Employers should explain this in the COBRA notices given to departing service members.

The employer's health plan may exclude illness or injury incurred in military service. These same rights would also apply to healthcare spending accounts often offered under a Section 125 pre-tax plan, that are, in general, subject to COBRA.

Retirement Plans. Returning employees have a period of up to three times the period they were out on leave to make up any missed 401(k) contributions (up to a maximum of five years). If the employee makes up the 401(k) contributions, the employer must make up its matching contributions over the same period. It is not required to make back allocations of forfeitures or earnings on the made-up contributions.

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When the employee returns to employment, the military service counts for all purposes under the Plan (vesting and participation, including break-in-service rules). Accordingly, a returning employee who was eligible for the 401(k) plan will immediately participate in the plan upon return to employment.

Other Benefits. An employee on military leave must be treated the same as any similarly situated (seniority, status and pay) employee on any other paid or unpaid "furlough" or authorized leave of absence for purposes of all other employee benefits. If an employer provides life, disability or AD&D insurance coverage, cafeteria plan or fringe benefits to employees on a non-military leave of absence (whether or not paid), the employee on military leave must be treated at least as favorably as similarly situated employees.

Vacation. An employee may not be forced to use their vacation during military

service and any unused vacation must be restored upon re-hire.

The specifics of a vacation pay program, (e.g., is vacation accrued at a certain rate based on hours of active work, or instead based on anniversary of employment) will dictate whether an employee will accrue additional paid vacation while in military service. For example, if the employer's policy provides three weeks of paid vacation to employees with five years of service on January 1st, the period of military leave must be treated as service for purposes of calculating whether the employee meets the five year requirement. On the other hand, where benefits such as vacation or sick pay accrue based on actual service rather than seniority (e.g., where the employee accrues two days of vacation for each month worked), the rehired employee does not need to be credited with the amounts that would have accrued during the military leave, unless the employer grants such credits to other

employees returning from a leave of absence.

An employee is entitled to receive any benefits not related to seniority (for example, a holiday bonus) that he or she would have otherwise received if they had not been at military service.

If you have questions, please contact Tom Hughes.



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Join Us For A Complimentary Client Seminar

Consider attending one of our upcoming seminars, with timely discussions on a variety of legal topics. The seminar presenters include Felhaber attorneys who have expertise in the seminar subject matter. The following seminars have been scheduled for 2003. Please contact Karen Dyck, Marketing Director, at kdyck@felhaber.com if you would like to receive a seminar invitation. Please state your name and address with the name of the seminar you would like to attend. You may also log on to www.felhaber.com, which will offer on-line registration approximately three weeks ahead of the seminar date.

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A Professional Association – Attorneys at Law

2003 SEMINAR DATES:

- Workers Compensation - April 10
- Association Management - April 24
- Multi-Employer Benefit Seminar - May 21
- Estate Planner - May 29
- Builder/Developer - Sept./Oct.
- Labor & Employment Law - October 10
- Health Law Seminar - To be determined

Minneapolis City Contractors Must Provide Domestic Partner Benefits

A new Minneapolis ordinance requires all contractors and subcontractors providing sufficient goods or services to the City of Minneapolis to provide to all employees with domestic partners benefits equal to those provided to employees who are married. The theory behind the ordinance is that it will help contractors recruit and retain the highest quality workforce, thereby insuring the highest caliber of goods and services the City receives.

Contractors and subcontractors can offer the same benefits to the partner or they can offer cash equivalents for employees

The new ordinance affects all contractors who have 21 or more employees, in either the current or preceding year, that provide goods or services to the City of Minneapolis. Covered contracts are only those that exceed \$100,000 for either personal services; the sale or purchase of supplies, materials, equipment, or rental thereof; or for construction, alteration, repair, or maintenance of personal property. Development contracts are not included, nor are contracts with related but distinct entities, such as the Minneapolis School District. Any subcontractor that enters into a contract with a qualifying contractor to perform work relating to a contract with the

City, which meets the 21-employee requirement, is also covered by the new ordinance.

Interestingly, the ordinance applies only to those portions of a contractor's operation that occur within the City of Minneapolis; or on real property that the City owns or has a right to occupy; and anywhere else in the United States where work related to a contract within the City of Minneapolis is being performed.

A domestic partner is any person who is currently registered as a domestic partner with a governmental body, or is a person who is in a domestic partnership consisting of two adults who are:

- Not related by blood closer than permitted under marriage laws of the State;
- Are not married;
- Are competent to enter into a contract;
- Are jointly responsible to each other for the necessities of life;
- Are committed to one another to the same extent as married persons are to each other, except for the traditional marital status and solemnities; and
- Do not have any other domestic partners.

Contractors and subcontractors have several ways to comply with this new ordinance - they can offer the same benefits to the partner or they can offer cash equivalents for employees. With regard to disability, life, health, and dental insurances, the contractor may pay its share of the single monthly premiums that are being paid for the contractor's employee, which will cover the cost of the

domestic partner's insurance, or can allow every employee to designate a legally-domiciled member of the employee's household as being eligible for spousal equivalent benefits, or it may decide to provide benefits neither to employees' spouses nor to employees' domestic partners.

There are also several exceptions to this ordinance:

- Contractors who cannot comply with the requirements of the new ordinance because those requirements are inconsistent with a grant or agreement with a public agency;
- Contractors that are religious or denominational organizations or religious educational institutions, as defined in the ordinance; or
- Contractors that are government entities.

Other "special circumstance exceptions" exist as well.

If you have questions regarding this article please contact Janet Ampe.



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Welcome Our New Attorney!

Felhaber, Larson, Fenlon and Vogt, P.A. is pleased to announce that H. Le Phan has joined our firm. Please join us in welcoming her to Felhaber.

H. Le Phan

Ms. Phan practices in the areas of labor & employment litigation, commercial litigation, and business immigration. Ms. Phan is admitted to practice in Minnesota and Nebraska, the U.S. District Court for the District of Minnesota and Nebraska and the Eighth Circuit Court of Appeals. She is a member of the American, Minnesota, Hennepin County and Ramsey County Bar Associations and the Minnesota Women Lawyers Association.

Ms. Phan graduated with a Bachelor of Arts, summa cum laude, in 1993, and earned her Juris Doctor from William Mitchell College of Law in 1997.



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Congratulations to the Felhaber attorneys elected to...

The Best Lawyers In America for 2003-2004

Ed Bohrer
John Brian
Dennis Merley
Thomas Vogt
Honnen Weiss
Paul Zech

Our law firm is pleased to announce its Best Lawyers in America for 2003-2004. These six lawyers have been included in the 2003-2004 edition of *The Best Lawyers In America* publication. These individuals were selected after an exhaustive peer-review survey in which 15,000 leading attorneys cast more than half a million "votes" on the legal abilities of other lawyers in their specialties. Please join us in congratulating these attorneys on their noteworthy accomplishments.

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Interactive Process Limited by Courts

The Equal Employment Opportunity Commission (EEOC) has issued regulations requiring all employers facing a request for accommodation under the Americans with Disabilities Act (ADA) to engage in “an interactive process” with the disabled person to insure that the wide range of possible accommodations are considered. Two significant questions arising out of this requirement are: (1) How does this affect state law under Minnesota’s Human Rights Act; and (2) What happens if the employer arrives at the right decision but does not properly engage in an interactive process?

The first question was just answered in *Danielson v. AT&T Corporation*, where the Minnesota Court of Appeals dismissed a failure to accommodate a claim by a former employee who alleged that the employer failed to offer her a proper accommodation to her photophobia, a light-induced impairment apparently exacerbated by heavy use of fluorescent lighting. Although the Court failed to address whether the condition is actually a disability (which would have been an interesting analysis), they did confirm that the company acted properly when it refused to allow Danielson to sit in an area without fluorescent light or give her a private office, but did offer her enough shielding (through special glasses and filtering devices) to permit her to work. The judges observed the oft-stated principle that an employer need not offer the precise accommodation that the employee requests when a suitable alternative accommodation is provided.

As for the interactive process, the Appeals Court refused to

recognize that such an obligation exists under the Human Rights Act. They found enough differences between the two laws to rule that EEOC’s regulations need not be observed under the State law.

The second question - what happens if the employer acts properly without an interactive process - was recently addressed in *Alexander v. The Northland Inn*, where a housekeeping supervisor was restricted from vacuuming. The Eighth Circuit Court of Appeals (which includes Minnesota) upheld the employer’s decision that vacuuming was an essential function of the job for its “working supervisors” and that no accommodation could reasonably be provided. When the employee asserted that the company was still liable for having failed to engage in the interactive process, the judges disagreed, ruling that there was no liability per se for simply violating this principle.

An employer need not offer the precise accommodation that the employee requests...

Obviously, this does not invalidate the interactive process, and it will continue to be a significant factor in determining the reasonableness of the employer’s accommodation efforts under federal law. However, the doctrine now appears to be dead under Minnesota’s discrimination law, and it will not be an independent basis for liability under federal law.

Both such decisions should be roundly applauded by Minnesota employers.



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We Want to Hear From You

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The *Labor & Employment Report* is a service to Felhaber's clients and friends. Our goal is to write articles you will read, learn from, and enjoy. Let us know what would serve you best: Practice tips? Answers to questions submitted by readers? A funny case or strange ruling from time to time (like the North Dakota judge who recently ruled that fear of snakes is not a disability under the ADA)?

Please contact editor Dennis Merley with your suggestions.



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LABOR & EMPLOYMENT REPORT

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The *Labor & Employment Report* is an update on legal developments. It is not intended to be legal advice and should not be relied on without consulting counsel.

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