LAW REVIEW 0604
USERRA REGULATIONS

Regulation Strength
Department of Labor's New Regulations Give Reservists a Boost under USERRA

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The Department of Labor (DOL) published in the Dec. 29, 2005, *Federal Register* the final regulations for the Uniformed Services Employment and Reemployment Rights Act (USERRA). They took effect Jan. 18, 2006. The regulations will be published in Title 20, Code of Federal Regulations (CFR), Part 1002.

Section 4331 of USERRA, 38 U.S.C. 4331, gives the secretary of labor the authority to promulgate regulations about the application of USERRA to state and local governments and private employers. DOL published proposed regulations in the *Federal Register* Sept. 20, 2004, and during the subsequent 60-day comment period I filed a comment addressing two specific issues. I am pleased that DOL made changes in the final version addressing these concerns. Information on the proposed regulations and my concerns appeared in Law Reviews 148, 153, 169, and 194.

Here are two specific scenarios I have heard hundreds of times in telephone calls and E-mails from affected Reserve Component personnel.

The first scenario relates to a promotion exam missed while on active duty. Let us say that Joe Smith is a patrolman in the State Police and a petty officer in the Coast Guard Reserve. He is mobilized and deployed to Southwest Asia as a member of a port security unit. While Smith is on active duty, the State Police offers patrolmen like Smith the opportunity to take a test for promotion to sergeant. Missing the opportunity is a big deal, because the opportunity arises infrequently.

DOL has now made clear, in 20 CFR 1002.193(b), that the State Police *must* give Smith the opportunity to take a make-up exam after he returns to work. "If the employee is successful on the make-up exam and, based on the results of that exam, there is a reasonable certainty that he or she would have been promoted, or made eligible for promotion, during the time that the employee served in the uniformed service, then the promotion or eligibility for promotion must be made effective as of the date it would have occurred had the employment not been interrupted by uniformed service."

As in the proposed regulation, DOL has provided that the returning servicemember must be given "a reasonable amount of time to adjust to the employment position" before taking the make-up promotion exam. In the final version, DOL has added several sentences addressing factors that must be considered in determining how much adjustment time is "reasonable" and required under the circumstances—a definite improvement.

The other issue relates to the application of USERRA's "escalator principle" to merit pay systems. In its first case construing the 1940 reemployment statute, the Supreme Court enunciated the escalator principle when it held, "[The returning veteran] does not step back on the seniority escalator at the point he stepped off. He steps back on at the precise point he would have occupied had he kept his position continuously during

the war" (*Fishgold v. Sullivan Drydock & Repair Corp.,* 328 U.S. 275, 284-85 [1946]). The escalator principle is expounded upon in hundreds of subsequent court decisions, including at least five later Supreme Court decisions. Section 4316(a) of USERRA, 38 U.S.C. 4316(a), codifies the escalator principle.

Today, unlike 1946, the norm in the private sector (and even in some government agencies) is for pay raises to depend upon performance evaluations, not seniority. How does the venerable escalator principle apply to a new situation not envisioned by the Supreme Court in 1946?

Let us say that Mary Jones is a civil affairs officer in the Army Reserve and has worked for XYZ Corp. since 1999. Mary was mobilized and deployed to Iraq in January 2004. She was demobilized and returned to work in early 2006. At XYZ, Mary missed all of 2005 and all but a few days of 2004.

Each XYZ employee receives a performance evaluation on December 31 of each year, and the evaluation determines the pay raise on January 1 for the upcoming year. At XYZ, as is typical, a handful of employees receive stellar performance evaluations and receive pay raises well in excess of inflation. Approximately 90 percent of employees receive "satisfactory" performance evaluations and pay raises roughly equal to inflation. A handful of employees receive "unsatisfactory" performance evaluations and no pay raises.

XYZ has a remarkable consistency from year to year as to which employees fall into each category, except for the unsatisfactory employees. Employees rated unsatisfactory must improve the next year or be terminated.

Mary Jones received satisfactory performance evaluations from XYZ for 1999 and 2000, and then stellar performance evaluations for 2001, 2002, and 2003. Upon her return to work in early 2006, Jones is informed that she will receive the same rate of pay she was receiving in January 2004, just before she was mobilized. "You were not here in 2004 or 2005, so we have nothing to evaluate," her supervisors say. "You receive no pay raise for those years."

This is a huge hit from which Jones will never recover. Even if Jones receives a generous pay raise in January 2007, based on another stellar evaluation for 2006, that pay raise will be computed on a lower base. Each subsequent pay raise Jones receives during her XYZ career will be significantly less than it would have been had she not been called to the colors in 2004. Even her civilian pension, many years from now, is likely to be adversely affected. Is this fair? I do not think so.

"If the employee [returning from military service] is reemployed in the escalator position, the employer must compensate him or her at the rate of pay associated with the escalator position. The rate of pay must be determined by taking into account any pay raises, differentials, step increases, merit increases, or periodic increases that the employee would have attained with reasonable certainty had he or she remained continuously employed during the period of service. In addition, when considering whether merit or performance increases would have been attained with reasonable certainty, an employer may examine the returning employee's own work history, his or her history of merit pay increases, and the work and pay history of employees in the same or similar position. For example, if the employee missed a merit pay increase while performing service, but qualified for previous merit pay increases, then the rate of pay should include the merit pay increase that was missed" (20 CFR 1002.236(a)).

I am pleased DOL stuck to its guns, despite substantial resistance, on this important point, and other points as well. You can find the complete text of the new regulations, and a lot of other useful information, at www.dol.gov/vets.

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