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Health Insurance Coverage for Son of Employee

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CATEGORY: USERRA—Health Insurance Coverage

Q: I am the president of a local union. Under our collective bargaining agreement with the employer, employees have health insurance coverage for their children. The coverage of the child ends when the child turns 18, unless the child is a high school or college student, in which case the coverage can extend until the child's 23rd birthday.

A member of our union (Let's call him Bill Jones Sr.) has a 19-year-old son (Bill Jones Jr.). Junior is enrolled in college full time and was still covered under his father's employee health insurance coverage until recently. Junior enlisted in the Navy Reserve early in 2006 and attended Navy training during the summer of 2006. Junior is now off active duty and back in college full time, for the fall term. The employer discontinued Junior's health insurance coverage, saying that Junior is no longer eligible for the company health insurance coverage because he joined the Navy. Help!

A: First, let me say that I think that all of this is probably a misunderstanding—the employer does not understand the difference between joining the Navy (full time) and joining the Navy Reserve. Junior has access to the military health-care system only when he is on active duty. If he gets sick at college while not on active duty, he will not have the right to use the military health-care system, so he definitely needs to have the health insurance coverage through his father's employment.

I suggest that you have the Smiths call the National Committee for Employer Support of the Guard and Reserve (ESGR), a Department of Defense (DoD) organization established in 1972 to gain and maintain the support of public and private employers for the men and women of the National Guard and Reserve. Call ESGR at 1-800-336-4590. I also invite your attention to the ESGR website, www.esgr.mil. An ESGR volunteer, called an ombudsman, can probably straighten out the employer here.

Let's assume a worst-case scenario—the employer digs in his heels and refuses to reinstate Junior's health insurance coverage. Does canceling the young man's health insurance coverage constitute a violation of the Uniformed Services Employment and Reemployment Rights Act (USERRA)? I think that the answer is yes—canceling the coverage is a violation of section 4311(a) of USERRA, although Junior has never worked for this employer or applied for employment there.

States Title 38, United States Code, section 4311(a) (emphasis supplied): "A person who is a

member of, applies to be a member of, performs, has performed, applies to perform, or has an obligation to perform service in a uniformed service shall not be denied initial employment, reemployment, retention in employment, promotion, or any *benefit of employment by an employer* on the basis of that membership, application for membership, performance of service, application for service, or obligation."

Please note that the prohibition on denial of benefits of employment is not limited to the employer of the individual who has joined or applied to join a uniformed service—the prohibition applies to an employer. I think that Junior has been denied a benefit of his father's employment (employee health insurance coverage) because of his membership in the Navy Reserve, and this is a violation of section 4311.

I think that it is clear that "an employer" means "any employer"—it is not limited to the employer of the individual who has enlisted in a uniformed service. I am not aware that this issue has arisen specifically under the reemployment statute, but it has arisen under other laws, including the Labor-Management Reporting and Disclosure Act (LMRDA). The LMRDA governs the internal affairs of labor unions, including union officer elections.

Section 401(g) of the LMRDA provides, "no moneys of *an employer* shall be contributed or applied to promote the candidacy of any person in an election subject to the provisions of this title [union officer elections]." 29 U.S.C. 481(g) (emphasis supplied). It has been held that the prohibition on the use of employer funds to promote the candidacy of a person in a union officer election applies to *any employer*—it is not limited to the employer of the members of the union conducting the election. *See Marshall v. International Brotherhood of Teamsters,* 611 F.2d 645 (6th Cir. 1979). Similarly, when Congress wrote "an employer" in section 4311(a) of USERRA, it was referring to any employer—usually but not always the employer of the claimant. If Congress had intended the prohibition to apply solely to the current employer of the claimant, Congress would have said "the employer."

In its first case construing the reemployment statute (originally enacted in 1940), the Supreme Court held that, "This legislation is to be liberally construed for the benefit of those who left private life to serve their country in its hour of great need." *Fishgold v. Sullivan Drydock & Repair Corp.,* 328 U.S. 275, 285 (1946). Based on this seminal holding, the reemployment statute has always been liberally construed for veterans and members of the uniformed services.

Congress enacted USERRA in 1994, as a rewrite of the 1940 statute construed by the Court in *Fishgold*. USERRA's legislative history makes clear the intent of Congress that this "liberal construction" requirement should continue. "The provisions of Federal law providing member of the uniformed services with employment and reemployment rights, protection against employment-related discrimination, and the protection of certain other rights and benefits have been eminently successful for over fifty years. Therefore, the Committee [House Committee on Veterans' Affairs] wishes to stress that the extensive body of case law that has evolved over that period, to the extent that it is consistent with the provisions of this Act,

remains in full force and effect in interpreting these provisions. This is particularly true of the basic principle established by the Supreme Court that the Act is to be 'liberally construed.' *See Sullivan Drydock & Repair Corp.,* 328 U.S. 275, 285 (1946); Alabama Power Co. v. Davis, 431 U.S. 581, 584 (1977)." House Rep. No. 103-65, 1994 *United States Code Congressional & Administrative News* 2449, 2452.

Moreover, quite apart from USERRA, Senior's rights under the collective bargaining agreement have been violated. The agreement gives him the right to employee health insurance coverage for his son until the son turns 23, so long as the son is in college. The employer's personnel director may have difficulty grasping the distinction between joining the Navy and joining the Navy Reserve, but I am confident that the arbitrator (if the grievance gets that far) will not have much difficulty with this concept and with finding that discontinuing Junior's health insurance coverage under these circumstances is a violation of the collective bargaining agreement.

I recognize that you (the union) have control over the grievance process—if you don't file a grievance for Senior, his claim under the agreement goes nowhere. I am sure I do not have to remind you that you have a duty of fair representation to all employees in the bargaining unit, including Bill Jones Sr. *See Chauffeurs, Teamsters, and Helpers Local No. 391 v. Terry,* 494 U.S. 558 (1990).

Military title shown for purposes of identification only. The views expressed herein are the personal views of the author, and not necessarily the views of the Department of the Navy, the Department of Defense, or the U.S. Government.