LAW REVIEW 1023

Reinstatement of Health Insurance Coverage after Return from Military Service

By Captain Samuel F. Wright, JAGC, USN (Ret.)

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Q: I am a volunteer ombudsman for the National Committee for Employer Support of the Guard and Reserve (ESGR), the Department of Defense organization that helps National Guard and Reserve personnel to resolve disputes with their civilian employers about their rights under the Uniformed Services Employment and Reemployment Rights Act (USERRA). Servicemembers call ESGR at 800-336-4590. Those members who are from my corner of this state are sent to me.

I have been doing this ombudsman work for several years, and I have developed a great familiarity with USERRA and with the Department of Labor (DOL) regulations promulgated under USERRA, but I am not a lawyer. This whole process seems to be getting more "lawyered up." More often than not, the employer retains an attorney, even at the very outset of the process. The lawyer will of course argue for the narrowest possible interpretation of USERRA and the regulations and will argue that the employer has no obligations, or only very limited obligations, to the returning veteran.

It gets even more complicated when there is a union involved, as in my recent ESGR case. The union will argue that its collective bargaining agreement (CBA) with the employer is the "alpha and the omega" on the question, regardless of what USERRA or some other federal law may provide.

In my case, we have a National Guard member (let's call him Joe Smith) who was mobilized and deployed toAfghanistan for more than a year. Before he was mobilized, he worked for a company here in our state that has a CBA with a union. Under the CBA, the employer pays money to a health insurance plan managed by the union. The employer makes a payment to the plan for each hour of covered employment by any employee in the collective bargaining unit that is represented by the union. When a covered employee has worked at least 300 hours of covered employment, the union plan pays a health insurance premium on behalf of that employee, and the employee and his or her family is then covered by the health insurance. A new employee does not have health insurance until he or she has worked at least 300 hours of covered employment. The union and the employer call this health insurance arrangement a "dollar plan."

Our National Guard member had worked for this employer for more than two years, when he was mobilized in January 2009. He had a positive "dollar plan" balance at the time he was called to the colors. He notified both the union and the employer of his mobilization. After he entered active duty, he and his family used the military health care plan (TRICARE) for all their medical needs during the time that he was on active duty. Nonetheless, the union used his positive "dollar plan" balance to purchase health insurance coverage for him—coverage he had not requested, did not need, and did not use.

The member was released from active duty in January 2010 and made a timely application for reemployment. He returned to work in February 2010. The union and the employer have told him that he has a zero balance in his "dollar plan" and that he and his family have no health insurance coverage until he has worked at least 300 hours of covered employment following his February reemployment. One of his children is seriously ill and cannot wait for needed medical care.

I use your "Law Review" columns frequently in my ombudsman work. I am aware that section 4317(b) of USERRA [38 U.S.C. 4317(b)] entitles the returning veteran to immediate

reinstatement of his or her health insurance coverage—there must be no waiting period and no exclusion of "pre-existing conditions." How does section 4317(b) apply to a "dollar plan" like we see in this case?

A: Section 4317(b) applies and requires the employer and union to reinstate Joe Smith's health insurance coverage immediately, without regard to the requirement that Smith first work at least 300 hours of covered employment. Making Smith wait for reinstatement of his coverage violates section 4317(b).

Congress enacted USERRA in 1994, as a rewrite of the Veterans' Reemployment Rights Act (VRRA), which can be traced back to 1940. In its first case construing the VRRA, the Supreme Court held that the law is to be "liberally construed for the benefit of he who laid aside his civilian pursuits to serve his country in its hour of great need." *Fishgold v. Sullivan Drydock & Repair Corp.,* 328 U.S. 275, 285 (1946). The employer's attorney will of course argue for a narrow and stingy interpretation of the reemployment statute, but the court will almost certainly follow the *Fishgold* mandate and construe the law broadly and generously, to benefit those who were called to the colors.

You should think of the reemployment statute as 70 years old, not 16. USERRA made some significant improvements in 1994, but the basic concepts of the law go back to 1940. USERRA's 1994 legislative history makes clear Congress' intent that the VRRA case law, including *Fishgold's* "liberal construction" mandate, should continue to apply in construing the generally similar provisions of USERRA:

"The provisions of Federal law providing members 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 Fishgold v. 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.

Fishgold also established the important principle that "no practice of employers or agreements between employers and unions can cut down the service adjustment benefits that Congress has secured the veteran under the Act." *Fishgold,*328 U.S. at 285. Section 4302 of USERRA follows this mandate in explaining the relationship between USERRA and the CBA between the union and the employer.

"Nothing in this chapter shall supersede, nullify or diminish any Federal or State law (including a local law or ordinance), contract, *agreement,* policy, plan, practice, or other matter *that establishes a right or benefit that is more beneficial to, or is in addition to, a right or benefit provided for such person in this chapter."* 38 U.S.C. 4302(a) (emphasis supplied).

"This chapter *supersedes* any State law (including a local law or ordinance), contract, *agreement,* policy, plan, practice, or other matter *that reduces, limits, or eliminates in any manner any right or benefit* provided by this chapter, including the establishment of additional prerequisites to the exercise of any such right or the receipt of any such benefit." 38 U.S.C. 4302(b) (emphasis supplied).

Thus, USERRA is a floor and not a ceiling on the rights of the employee who was called to the colors. The CBA can give Joe Smith greater or additional rights, but the CBA cannot take away rights that Congress gave Joe Smith when it enacted USERRA.

Because Joe met the USERRA eligibility criteria in early 2010, he was entitled to prompt reemployment in the position of employment that he would have attained if he had remained continuously employed or another position, for which Joe is qualified, that is of like seniority, status, and pay. Moreover, Joe was entitled to reinstatement of the health insurance coverage that Joe enjoyed through his job and that was terminated shortly after Joe was called to active duty.

"Except as provide in paragraph (2) [pertaining to the returning servicemember who is suffering from an injury or illness that the Secretary of Veterans Affairs has determined to have been incurred in or aggravated during a period of uniformed service and thus not applicable to Joe Smith's case], in the case of

a person whose coverage under a health plan was terminated by reason of service in the uniformed services, …., an exclusion or waiting period may not be imposed in connection with the reinstatement of such coverage upon reemployment under this chapter if an exclusion or waiting period would not have been imposed under a health plan had coverage of such person by such plan not been terminated as a result of such service or eligibility. This paragraph applies to the person who is reemployed and to any person who is covered by such plan by reason of the reinstatement of the coverage of such person." 38 U.S.C. 4317(b)(1).

Under this section, Joe Smith is entitled to *immediate* reinstatement of his health insurance coverage, for himself and his family, upon his reemployment under USERRA. Making him wait until he has performed 300 hours of post-reemployment covered work is a direct violation of section 4317(b)(1).

Q: The union attorney contends that, at a minimum, Joe Smith must compensate the union health plan for what the employer would have paid for 300 hours of covered employment, before Smith's health insurance coverage can be reinstated during his first 300 hours of post-reemployment covered employment. The union attorney cites 20 C.F.R. 1002.171 in support of his claim. Is the union attorney correct?

A: No, the union attorney is wrong. The attorney is confusing section 4317(a) (health insurance *continuation during service*) with section 4317(b) (health insurance *reinstatement after service*). Your claimant is asserting his right to*reinstatement* of his health insurance coverage after he has returned to work. Section 4317(a) and 20 C.F.R. 1002.171 are irrelevant to your claimant's case, because those sections deal with the right to continuation of coverage during service. There is nothing in the DOL USERRA regulations that conflicts with my assertion that section 4317(b)(1) requires the employer and the union-operated health insurance plan to reinstate Joe Smith's health insurance coverage immediately upon his reemployment, without regard to the requirement that he work at least 300 hours of covered employment first.

Section 4331 of USERRA gives the Secretary of Labor the authority to promulgate regulations about the application of USERRA to state and local governments and private employers. 38 U.S.C. 4331. The Secretary utilized that authority, and DOL published the final USERRA regulations in the *Federal Register* on December 19, 2005. The regulations are published in title 20 of the Code of Federal Regulations (C.F.R.) at Part 1002.

From the heading of section 1002.171, it is clear that this section applies to health insurance *continuation* under section 4317(a) and not health insurance *reinstatement* under section 4317(b).

In Law Review 1024, I will explain further about section 4317(a) and how it is to be distinguished from section 4317(b).

It should also be noted that Joe Smith had a positive balance in his "dollar plan" account at the time he was called to the colors. The union unlawfully frittered away that positive balance by purchasing health insurance coverage for Smith*during* his period of service. He did not request, did not need, and did not use that coverage. But for the union's unlawful act, Smith would have had a positive balance upon his return to work in February 2010.

Q: The union lawyer said that in any case USERRA only applies to employers, and the union is not an employer, so these USERRA requirements are not binding on the union. Is the union lawyer correct?

A: No, the union lawyer is wrong.

I invite your attention to section 4303 of USERRA, the definitions section. The definition of "employer" includes "a person, institution, organization, or other entity to whom the employer has delegated the performance of employment related responsibilities." 38 U.S.C. 4303(4)(A)(i). In this case, the employer or group of employers has delegated to the union the responsibility to manage the health insurance plan and to determine eligibility to participate in the plan, including for Joe Smith.

The union thus qualifies as an "employer" for USERRA purposes. If this matter is not resolved by ESGR or by DOL, Joe Smith should sue both the employer and the union, in the appropriate United States District Court. He can sue through private counsel that he may retain, or he can complain to DOL and get DOL to refer the matter to the Department of Justice (DOJ), and DOJ could file the suit on Smith's behalf, at no cost to Smith.

If you have questions, suggestions, or comments, please contact Captain Samuel F. Wright, JAGC, USN (Ret.) (Director of the Servicemembers' Law Center) at swright@roa.org or 800-809-9448, ext. 730.