LAW REVIEW 1096

Prior Notice to Civilian Employer - Part 2

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1.1.3.2—USERRA Applicability to Regular Military Service
1.3.1.1—Left Job for Service and Gave Prior Notice

Q: I own and operate a company in Guam. We have 300 employees. By the standards of Guam, that makes us a big company. Three of the employees (let's call them Bob Jones, Mary Smith, and Steve Williams) did not show up for work on Monday. In Tuesday's newspaper, there was a long article about them, with a photograph of the three of them boarding an airplane to travel to Army boot camp. It seems that all three enlisted some months ago, without consulting me or even informing me.

Jones gave me no notice whatsoever. I saw him late Friday afternoon, as he was leaving our premises at the end of his shift. He said nothing to me about not being at work on Monday. On that same Friday, Smith told me that she was quitting, but she said nothing about joining the Army. Williams told me that he was quitting and that he was joining the Army. He told me that he had firmly decided to make the Army his career, and that he might be back to Guam in about 25 years, when he retires.

I have read about the Uniformed Services Employment and Reemployment Rights Act (USERRA). Does that law apply here in Guam? Most of the material I have seen about USERRA relates to members of the National Guard and Reserve. My three employees joined the Regular Army, not the Army Reserve or Army National Guard. Does USERRA apply to Regular Army service? Is it possible that Jones, Smith, and Williams will have the right to reemployment with my company at some point?

A: First, let me assure you that USERRA applies in Guam just as it applies in Kansas. Guam is a U.S. territory, with a U.S. District Court. Second, the federal reemployment statute has always applied to regular military service and is not limited to National Guard and Reserve service. I invite your attention to Law Review 0719 (May 2007), available at www.roa.org/law_review. At that site, you will find more than 750 articles about USERRA and other laws that are particularly pertinent to those who serve our nation in uniform. You will also find a detailed subject index and a search function, to facilitate finding articles about very specific topics.

As I explained in Law Review 0766 and other articles, an individual must meet five eligibility criteria to have the right to reemployment under USERRA:

a. Must have left the civilian job for the purpose of performing voluntary or involuntary service in the uniformed services. The period of service can be anything from five hours (one drill period for a National Guard or Reserve member) to five years or more of full-time voluntary active duty.

b. Must have given the employer prior oral or written notice.

c. The individual's cumulative period or periods of uniformed service (with respect to the employer relationship for which the individual seeks reemployment) must not have exceeded five years. All involuntary service and some voluntary service are exempted from the computation of the five-year limit. Please see Law Review 201 for a definitive discussion of what counts and what does not count.

d. Must have been released from the period of service without having received a punitive or other than honorable discharge.

e. Must have made a timely application for reemployment after release from the period of service. After a period of more than 180 days of service, the individual has 90 days to apply for reemployment. Shorter deadlines apply after shorter periods of service.

It is necessary to meet all five of these conditions to have the right to reemployment. It appears that Jones and Smith will not have the right to reemployment, because they failed to give you oral or written notice that they were leaving their jobs for the purpose of performing uniformed service.

Section 4312(a)(1) provides that the notice to the civilian employer may be provided by the individual who is to perform service or by an appropriate officer of the uniformed service in which the service is to be performed. Perhaps the Army recruiter sent you a postcard or e-mail informing you that Jones and Smith had enlisted in the Army and would be leaving their jobs to report to boot camp. If so, that notice from the recruiter would satisfy the requirements of section 4312(a)(1).

Section 4312(b) provides that prior notice is not required in cases where it is precluded by military necessity or otherwise impossible or unreasonable. It seems most unlikely that this exception to the notice requirement would apply to Jones or Smith.

It seems clear that Jones and Smith will not have reemployment rights, because they failed to give you advance notice that they were leaving their jobs for service. Williams, however, will have reemployment rights, provided he meets the other four eligibility criteria. His use of the word "quit" or "resign" when giving you notice does not defeat his right to reemployment. Please see Law Review 63, and please see Law Review 1095 (the immediately preceding article in our chronological index) for a definitive discussion of USERRA's prior notice requirement.