

IT'S THE LAW

January, 2006

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Employers Beware:
Illinois Passes Two Pro-Labor Bills

In the Summer of 2005, Governor Rod Blagojevich, signed a pro-labor bill that expands workers picketing rights during job actions. House Bill 1480 became effective January 1, 2006 and amends the Illinois Labor Dispute Act to allow striking workers to use a public right-of-way to park up to ten (10) vehicles, erect "temporary shelters" i.e., tents or warming shelters, and post "temporary signs informing the public about the labor dispute. The temporary shelters may not be permanently affixed to a public right-of-way and may not exceed 300 square feet in size. All signs, tents or temporary shelters must be removed at the end of each day or when the picketing has ceased. The law, however, bars signage and shelters that obscure traffic signals, block fire hydrants, or obscure drivers' views of traffic and further requires

picketers to leave a reasonable walkway for pedestrians. The law also prohibits the erection of tents or shelters on the right-of-way of any Class I highway which is defined as interstate highway, expressway or tollway.

Another new Bill which became law on January 1, 2006 creates a new privilege for communications between a union agent and a bargaining unit member. Similar to the attorney/client privilege, the new laws prohibit the compelled disclosure of any information obtained by a union agent in the performance of his professional duties or when acting in his or his representative capacity. This privilege may be asserted in any court, board arbitration, or agency proceeding to the extent that said communication does not fall within one of the exceptions. The exceptions provide that a union agent may use or reveal the information obtained therein during the course of his professional, representative duties if ordered by court, the bargaining unit member authorizes the disclosure, it is necessary to prevent the commission of a crime that is likely to result in a clear, imminent risk of serious physical injury or death to another person and/or there is an action against the union agent in his or her personal or representational capacity. It should be noted that the privilege exists to the extent that said privilege does not conflict with any federal or state labor laws.

Within the upcoming months, it will be interesting to see how the new laws play out in the courts. Ultimately, the Federal Court in the Northern District of Illinois may determine that the new laws are pre-empted by the National Labor Relations Act. In the meantime, one should be mindful of the new laws and should

always consult a competent labor attorney regarding the scope and interpretation of the new laws.

ILLINOIS PASSES THE FAMILY MILITARY LEAVE ACT

Governor Rod Blagojevich also signed into law the Family Military Leave Act giving employees, whose family members are called into active military duty, unpaid leave to spend with those family members. The Act, which went into effect on August 15, 2005, covers employers who have at least 15 employees and mandates up to 15 days of unpaid leave to employees who have a spouse or are parents of a soldier called into active duty. Employers with more than 50 employees must provide such employees up to 30 days of leave. The Act covers employees who have been employed for at least 12 months by the same employer and have at least 1250 hours of service during the 12 month period immediately preceding the commencement of the leave. The employee must give at least 14 days notice of the intended date upon which the Family Military Leave will commence in situations where the leave will consist of 5 or more consecutive work days. In situations where the Military Leave is for less than 5 consecutive days, the employee shall give the employer as much advance notice as is practicable. The employer may require certification from the proper military authority to verify the employee's eligibility for the Family Military Leave requested. The employer may, however, require an employee exhaust all accrued vacation leave, personal leave, compensatory leave, and any other leave that may be granted to the employee except sick leave and

ILLINOIS AMENDS PREVAILING WAGE ACT

Contractors and subcontractors operating on projects requiring compliance with the Prevailing Wage Act are now required to submit monthly certified payroll to the public body in charge of the project. The monthly payroll records may be

submitted in person, by mail, or electronically and must now include the number of hours worked each day, the starting and ending times of work each day, and the classification of each employee employed on the project.

disability leave prior to granting an employee's request for leave under the Act.

Any employee who exercises his/her right to the Family Military Leave under the Act shall be entitled to be restored by the employer to the position held by the employee when leave commenced or to a position with equivalent seniority status, employee benefits, pay, or other terms of employment upon his/her return. The employee is entitled to continue all benefits at the employee's expense unless the employee and employer negotiate for the employer to pay for the maintenance of these benefits. An employee who takes leave under the Act cannot lose any accrued benefits he or she had prior to taking the leave. Nothing in the Act, however, shall be construed to affect an employer's obligation to comply with any Collective Bargaining Agreements or any employee benefit plan that provides greater leave rights to employees than the rights provided under this Act.

Lastly, covered employers are prohibited from interfering with or denying employees exercise over the rights created under the Act. Employers are prohibited from retaliating or otherwise discriminating against employees electing leave under this Act. Employers who violate any portion of this Act may be subject to civil action brought in the Circuit Court which is empowered to enjoin violations and to order any other equitable relief that is necessary and appropriate. It should be noted that unlike many other pro-labor legislation, this Act does not provide for a posting requirement.

Additionally, the certified payroll shall be accompanied by a statement signed by the contractor or subcontractor which avers: (1) the records are true and accurate; (2) all employees covered by the Act were not paid less than the prevailing wage, and (3) the contractor acknowledges that filing a false certified payroll constitutes a Class B misdemeanor.

Lastly, a contractor or subcontractor's failure to submit a certified payroll monthly may result in a Class B misdemeanor. To ensure compliance, it would be prudent to consult a competent labor attorney to ensure that the monthly submission complies with the Act.

Blood Donation Leave

On June 15, 2005, Governor Blagojevich signed into law the Illinois Blood Donation Leave Act (House Bill 324). Under this new law, a full-time employee who has been employed by an employer for at least six months can request up to one hour of paid leave to donate blood every 56 days, and must seek advance approval from his/her employer. The Act applies to "any unit of local government, Board of Election Commissioners, or any private employer in the State of Illinois who has 51 or more employees. This law became effective January 1, 2006.

UNEMPLOYMENT BENEFITS & THE LOCKED OUT EMPLOYEE

On March 7, 2005 Illinois Governor Rod Blagojevich signed a law that amended Section 604 of the Illinois Employment Insurance Act. As amended, Section 604 now provides unemployment benefits to employees who are locked out by their employer. Locked out workers are entitled to unemployment benefits unless: 1) their Union has refused to negotiate under reasonable condition; 2) the National Labor Relations Board (NLRB) determines that the Union has failed to bargain in

good faith; or 3) the lockout violates an existing Collective Bargaining Agreement. Considering the Illinois Supreme Court held that the state is to remain neutral in labor disputes and collective bargaining and is prohibited from rendering assistance to either employer or labor, the amended provision is sure to face challenges. This law which went into effect January 1, 2006 will increase the burden on employers who lock out unionized workers during a labor dispute and should definitely be considered when discussing the pro's and con's of a lock out.

When Johnny comes marching home again, The Uniformed Services Employment and employment Rights Act

With the conflict in the Middle East requiring the activation of reservists, many employers need to understand their legal obligations to their employees who are called to duty. The main source for reservists rights is The Uniformed Services Employment and Reemployment Rights Act (USERRA).

What is the USERRA

The Uniformed Services Employment and Re-employment Rights Act was enacted in congressional response to the Supreme Court's decision in *Monroe v. Standard Oil Co.*, (1981), wherein the Court held that the USERRA's antecedent, the Vietnam Era Veterans' Readjustment Assistance Act of 1974, "was enacted for the significant but limited purpose of protecting the employee-reservist against discriminations ... motivated solely by reserve status." The Court concluded that liability for violation of the statute could not be found unless the employee's reserve status was the sole motivation for the discriminatory conduct.

In 1994, Congress enacted The Uniformed Services Employment and Re-employment Rights Act. It prohibits discrimination against persons because of their service in the Armed Forces Reserve, the National Guard, or other uniformed services. USERRA prohibits an employer from denying any benefit of employment on the basis of an individual's membership, application for membership, performance of service, application for service, or obligation for service in the uniformed services. USERRA also protects the right of veterans, reservists, National Guard members, and certain other members of the uniformed services to reclaim their civilian employment after being absent due to military service or training. One of the keys of the USERRA is that a violation occurs when a person's military service is a "motivating factor" in the discriminatory action, even if not the sole factor.

Who is covered under the USERRA

The Act applies to persons who perform duty, voluntarily or involuntarily, in the "uniformed services," which include the Army, Navy, Marine Corps, Air Force, Coast Guard, and Public Health Service commissioned corps, as well as the reserve components of each of these services. Federal training or service in the Army National Guard and Air National Guard also gives rise to rights under USERRA. The USERRA covers nearly all

- Less than 31 days they must report to their employer by the beginning of the first regularly scheduled work period after the end of the calendar day of duty, plus time required to return home safely and an eight hour rest period. If this is impossible or unreasonable, then as soon as possible.
- 31 to 180 days then the employee must apply for re-employment no later than 14 days after

However if an employee has a service-connected injury or illness the reporting or application deadlines are extended for up to two

employees, including part-time and probationary employees. And unlike certain other laws, like the FMLA, the USERRA applies to virtually all U.S. employers, regardless of size.

What the USERRA requires of the employee.

In order for an employee to take advantage of the protections of the USERRA, he must meet five conditions. First, he must have held the civilian job at the time he was called into duty. Second, he must have given notice to the employer that he or she was leaving the job for service in the uniformed services, unless giving notice was precluded by military necessity or otherwise impossible or unreasonable. Third, the time he has served must be under five years. Fourth, he must not have been released from service under dishonorable or other punitive conditions. Fifth, he must have reported back to the civilian job in a timely manner or have submitted a timely application for re-employment.

Under the USERRA, an employee is required to inform their employer not only when they leave, but also when they return. How soon an employee must notify his employer upon his return depends upon the length of time the employee was serving. If the employee served:

- completion of military service. If this is impossible or unreasonable through no fault of the employee, then as soon as possible.
- 181 days or more then the employee must apply for re-employment no later than 90 days after completion of military service.

years for persons who are hospitalized or convalescing.

Once an employee has met these five conditions, then he is entitled to the protections of the USERRA.

What the USERRA requires of an employer

Employers are required to provide to persons entitled to the rights and benefits under the Uniformed Services Employment and Re-employment Rights Act (USERRA), a notice of the rights, benefits and obligations of such persons and such employers under USERRA. Employers may provide the notice, "Your Rights Under USERRA", by posting it where employee notices are customarily placed. However, employers are free to provide the notice to employees in other ways that will minimize costs while ensuring that the full text of the notice is provided (e.g., by handing or mailing out the notice, or distributing the notice via electronic mail).

When your employees are called up.

Employers must allow an employee the option to continue his health and pension benefits. However, individuals performing military duty of more than 30 days that elect to continue employer sponsored health care for up to 18 months; may be required to pay up to 102 percent of the full premium. For military service of less than 31 days, health care coverage is provided as if the service member had remained employed. USERRA clarifies pension plan coverage by making explicit that all pension plans are protected.

When your employees come back Once an employee has applied for re-employment, an employer must be re-employed in the job that they would have attained had they not been absent for military service, with the same seniority, status and pay, as well as other rights and benefits determined by seniority. However, USERRA also requires that reasonable efforts (such as training or retraining) be made to enable returning service members to refresh or upgrade their skills to help them qualify for re-employment. The law clearly provides for alternative re-employment positions if the service member cannot qualify for the "escalator" position. USERRA also reaffirms and clarifies that while an individual is performing military service, he or she is deemed to be on a furlough or leave of absence and is entitled to the non-seniority rights accorded other individuals on non-military leaves of absence.

Employees' Remedies

If an employee believes that his rights under the USERRA have been violated, he may petition for remedies through two venues. The first is the administrative route (handled by the United States Department of Labor, Veterans' Employment and Training Service). The second is the litigation route (handled by the U.S. Attorney General or the Office of Special Counsel). Remedies may differ depending on which route is chosen.

Remedies available through the administrative route can include:

- Return to a job
- Back pay
- Lost benefits
- Corrected personnel files
- Lost promotional opportunities
- Retroactive seniority
- Pension adjustments
- Restored vacation

An employee can only recover dollar-for-dollar that which was lost, with no recourse to any punishment of, nor penalty on, the employer. Remedies available through the litigation route include everything available administratively. Additionally, if resolution is unsuccessful following an investigation, the service member may have his or her claim referred to the Department of Justice for consideration of representation in the appropriate District Court, at no cost to the claimant. The courts can require the employer to comply with the law and restore all compensation referred to above. Where violation is considered willful the court may double any amount due as liquidated damages. The court may NOT, however, impose any punitive damages under USERRA.

Recent Developments

As men and women have been called up to serve in the military, and returning from service, in much greater numbers, Federal Courts around the country have been forced to interpret the USERRA. Since the USERRA was drafted after the Gulf War, the conflicts in Iraq and Afghanistan are the first test of this legislation on a large scale.

USERRA Trumps Binding Arbitration Clauses

In a recent case in Texas, a federal judge held that the USERRA's text and legislative history evidence Congress's clear intent to treat the right to a jury trial as a right not subject to waiver in favor of arbitration. Parties are still allowed to take advantage of non-binding arbitration.

Employee may have a cause of action under USERRA for military service based harassment

A federal judge in Tennessee has allowed a claim under the USERRA to proceed where the only charge was that an ex-serviceman's coworkers were harassing him and subjecting him to "derogatory ethnic names because of his military service" and "repeatedly being referred to as 'HABIB.'" The court held that the purpose of the USERRA is 'to prohibit discrimination against persons because of their service in the uniformed services. And based on the broad interpretation that Congress intended be given to USERRA and the well-established principle that discrimination encompasses hostile environment claims, that harassment on account of prior service in the uniformed services, which is sufficiently pervasive to alter the conditions of employment and create an abusive working environment, is a violation of the USERRA.

However, in order to succeed on such a claim, Plaintiff must establish that the employer's conduct was "sufficiently pervasive to alter the conditions of employment and create an abusive working environment," and that Plaintiff is entitled to such a benefit of employment by virtue of an employer policy.

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