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Client Bulletin #460

Feds Are Gearing Up for Veterans' Return to the Workforce, and Employers Must Prepare as We Welcome Our Veterans Home

By Susan Bassford Wilson
St. Louis Office

As the war winds down and an estimated 1 million veterans return to the workplace, the U.S. Department of Labor and the Equal Employment Opportunity Commission are preparing for veteran-related litigation. Employers can expect a renewed focus on

- * the Uniformed Services Employment and Reemployment Rights Act,
- * the EEOC's recently issued **guidance** for veterans on the Americans with Disabilities Act, and
- * the DOL's **proposed regulations** regarding "military-related" leave under the Family and Medical Leave Act.

According to the EEOC, 3 million veterans have returned from military service in the past 10 years and another 1 million veterans are expected to reenter the workplace in the next five years. With these laws, as well as veterans requirements for federal contractors, employers should begin preparing to facilitate successful transitions for veterans returning to the civilian workforce.

ADA Guidance

The ADA prohibits private and government employers with 15 or more employees from discriminating against individuals on the basis of disability, and requires reasonable accommodations in some situations. (It also requires confidentiality of medical information and places limitations on medical information that an employer can request during the hiring process and after employment begins.)

The ADA was amended in the fall of 2008 to **dramatically broaden the category of people who are considered "disabled"** and therefore protected by the non-discrimination and reasonable accommodation provisions.

Under the ADA, a veteran with a service-related disability is covered by the ADA if he or she meets the amended ADA's liberal definition of disability and is qualified for the job he has or wants. We expect that many service-connected conditions will meet the definition of "disability" under the amended ADA.

An individual is "qualified" if he or she is able to meet an employer's requirements for the position – including education, training, employment experience or skills

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– and is able to perform the job's essential or fundamental duties, with or without reasonable accommodation. Although in most cases, it is the employee's responsibility to let the employer know that he or she needs an accommodation, the employer may take the initiative if the disability is obvious.

A request for reasonable accommodation should trigger an **“interactive process”** between the individual and the employer to determine what accommodation is needed to allow the veteran to perform the job.

USERRA

USERRA prohibits employers from discriminating against employees or applicants for employment on the basis of their military status or military obligations. It also protects the reemployment rights of individuals who leave their civilian jobs (whether voluntarily or involuntarily) to serve in the uniformed services, including the U.S. Reserve forces and state National Guards. And, unlike many other federal statutes, USERRA applies to all employers, regardless of size.

At its most basic level, USERRA provides that returning servicemembers are to be reemployed in the job that they would have attained had they not been absent for military service (commonly referred to as the “escalator” position), with the same seniority, status and pay, as well as other rights and benefits determined by seniority. 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 reemployment. And, unlike some other federal laws, *the right of a veteran to reemployment is not contingent on the existence of a vacancy*. Further, the statute also provides for alternative reemployment positions if the service member cannot qualify for the “escalator” position.

Like the ADA, USERRA has a reasonable accommodation requirement for disabled veterans. However, the USERRA requirement is more stringent: if a veteran cannot resume the pre-service position he or she left due to a service-related disability, USERRA requires the employer to provide a position for injured returning veterans that is equivalent in seniority, status and pay, or – if an equivalent position does not exist – in the nearest approximation to an equivalent position. In some circumstances, the employer is required to provide training or retraining for the position.

FMLA

Constangy recently issued **a detailed Client Bulletin** on the DOL's proposed regulations on the Family and Medical Leave Act. Although some of the changes applied to “regular” FMLA leave, most of the changes were intended to interpret the National Defense Authorization Act of Fiscal Year 2010, which was enacted after the most recent version of the FMLA regulations became effective in January 2009. Comments are being accepted until April 16, 2012 (links appear in the bulletin).

The federal government is dedicated to ensuring the rights of veterans, as are judges, juries, and the public at large, for good reason. Employers need to be sure that they avoid discriminating against veterans, that they make all necessary reasonable accommodations, and that they comply with these laws. Violators are unlikely to get much sympathy from any quarter.

If you need assistance or training, please contact any member of Constangy's **Litigation Practice Group** or the Constangy attorney of your choice.

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About Constangy, Brooks & Smith, LLP

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