



Legal Alert: USERRA Expanded to Include Hostile Work Environment Claims

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Executive Summary: On November 21, 2011, President Obama signed into law the VOW to Hire Heroes Act of 2011. The new law contains three main provisions: (1) amends and expands the protections under the Uniformed Services Employment and Reemployment Rights Act (USERRA); (2) amends the Internal Revenue Code to provide certain tax credits to tax-exempt companies that hire unemployed veterans; and (3) creates new and expanded education, training, and transition programs for veterans within the federal Departments of Labor and Veterans Affairs. The first provisions of the new law (amendment to USERRA) may make it easier for employees (including former, part-time and probationary employees) to sue their employers for discrimination related to their military status.

The new law was passed with bipartisan support and is intended to reduce unemployment rates for veterans of the Iraq and Afghanistan wars by helping hundreds of thousands of unemployed veterans get back into the workforce. However, the provision of VOW which broadens the scope of USERRA to include a claim for hostile work environment is garnering a lot of attention. Previously it was unclear whether USERRA provided coverage for claims of harassment and hostile work environment based on military status. Until March 22, 2011, some federal courts were reluctant to address hostile work environment claims under USERRA. The Supreme Court had not addressed the issue, most district courts were divided on the question and only a few circuit courts assumed that hostile work environment was a legitimate claim under USERRA. Then, on March 22, 2011, the U.S. Court of Appeals for the Fifth Circuit issued a decision in *Carder v. Continental Airlines*, which held that USERRA, unlike Title VII, did not provide for a hostile work environment claim because the statute did not include the phrase "the terms, conditions, or privileges of employment" in its definition of benefits of employment. Less than nine months later, Congress amended USERRA, adding the same language used in Title VII, expressing its disagreement with what the Fifth Circuit did in the *Carder* case.

The new law does not address damages. Successful USERRA plaintiffs may be entitled to lost wages or benefits and liquidated damages equal to lost wages and benefits for willful violations (also known as double damages). Remedies available to successful Title VII plaintiffs may include: injunctive relief; back pay; **compensatory damages for future loss, emotional distress, pain and suffering, inconvenience, mental anguish and loss of enjoyment of life**; attorneys' fees and costs; punitive damages where intentional discrimination with malice or reckless indifference is proven; and

front pay. Needless to say, with the new amendment to USERRA the potential exists for far greater exposure to employers. Employers, as a result, may find it more difficult to obtain dismissal of USERRA claims even where the employee has not suffered a direct monetary loss.

There are three reasons why employers need to ensure promptly that they are in compliance with USERRA: (1) the USERRA amendment adding hostile work environment as a claim; (2) the Supreme Court decision in *Staub v. Proctor Hospital*, (holding that an employer could be liable for a violation of USERRA even if the person who made the adverse employment decision was not hostile toward the employee's membership in a uniformed service but was influenced by previous company action that was the product of such hostility); and (3) the recent draw-down of troops in Iraq and Afghanistan. Although the Department of Labor has not implemented regulations interpreting the amendment and courts have yet to address it, the expansion of USERRA's protection to include hostile work environment makes clear the importance of employer compliance.

Employers' Bottom Line:

Employers should consider training all supervisors regarding USERRA compliance. Additionally, employers should review and revise, if necessary, their policies and procedures regarding anti-harassment, hostile work environment and equal opportunities to include military and veteran status as a protected class. Finally, employers should develop and provide reporting procedures for USERRA-covered workplace complaints and quickly investigate them.

If you have any questions about this Alert or other labor or employment related issues, please contact Terry Price, tprice@fordharrison.com, or Scott Evans, sevens@fordharrison.com, both of whom are attorneys in our Birmingham, Alabama office, or the Ford & Harrison attorney with whom you usually work.