

CLIENT ALERT

Employment & Labor

March 2005

Volume VI No. 11

New Protections for Workers Called to Military Service

On December 10, 2004, President Bush signed the Veterans Benefits Improvement Act of 2004. The new law increases workplace protections for employees called to active duty in the military and National Guard by amending the 1994 Uniformed Services Employment and Reemployment Rights Act ("USERRA"), and places new and additional requirements on employers who have employees subject to being called to service.

USERRA, which applies to all employers, public and private, regardless of size or location, protects employees who are members of any branch of the uniformed services, the National Guard or the reserves, and who are required to leave their positions of employment for active military duty. Under USERRA, employees who have been away from the job because of military service are required to be reinstated to their original position if such position is available, or in a position of comparable seniority status and pay, unless work place conditions have changed to such a degree during the employee's engagement in active duty that re-employment would be either "impossible" or "unreasonable."

A key provision of USERRA is the requirement that the employee returning from military service be treated as if he or she had never been on leave. In this regard, the law requires that an employee returning from military service be provided with seniority at the level he or she would have reached had he or she not been called to active duty, rather than to the level held at the time the leave

commenced. Similarly, USERRA requires that employers that allow employees to earn vacation time based on years of service, or base retirement on time spent on the job, must calculate such benefits for employees returning from military service as if they never left their positions. Under USERRA, employers are also required to maintain health insurance coverage for employees whose military service requires a leave of absence from employment of less than 31 days, and to allow those employees who are engaged in active duty for more than 30 days to elect to continue group coverage for up to 18 months.

The newly enacted Veterans Benefits law amends USERRA in two significant respects. First, the amendment increases from 18 months to 24 months the maximum period of employer sponsored group health coverage that an employee may elect to participate in while engaged in active service. Such election is available to all employees covered by USERRA, even if their employer is not covered COBRA. Similar to the provisions of COBRA, the employee on military leave cannot be required to pay more than 102 percent of the full premium charged for group coverage. The new right to 24 months of continuation coverage applies to coverage elections made on or after the date of the enactment of the law on December 10, 2004.

Second, the Veterans Benefits law amended USERRA to require employers to provide employees with notice of their rights and benefits under USERRA, and of the employer's legal obligations with regard to leaves of absence and re-employment. In this respect, the Veterans Benefits law requires the posting of an

Sills Cummis Epstein & Gross

A Professional Corporation

appropriate notice of USERRA rights where other employee notices are customarily posted at the place of employment as follows:

“Each employer shall provide to persons entitled to rights and benefits under this chapter a notice of the rights, benefits, and obligations of such persons and such employers under this chapter. The requirement for the provision of notice under this section may be met by the posting of the notice where employers customarily place notices for employees.”

The posting requirement became effective as of March 10, 2005, and proper notices were to have been made available to employers by the Secretary of Labor prior to that date. Notices designed to satisfy the new notice posting requirement which had been posted by the Secretary of Labor on the Department of Labor website (www.dol.gov/vets) prior to March 3, 2005, were withdrawn on that date and have been replaced by a revised notice which fully satisfies the law’s posting requirement.

We send these Alerts to our clients and friends to provide information on recent developments in the law. The Alerts, however, should not be relied on for legal advice in any particular matter.

For further Employment & Labor information, please contact:

David W. Garland, Co-Chair
Employment & Labor
973.643.6390
dgarland@sillscummis.com

Lester Aron, Co-Chair
Employment & Labor
973.643.5795
laron@sillscummis.com

Blogging Update

In an interesting twist, three bloggers moved to intervene to block a subpoena issued by Apple Computer in a California case entitled *Apple Computer, Inc. v. Doe et. al.* Apple had filed a complaint in December 2004 alleging that various unnamed individuals or entities had leaked certain trade secret information about new Apple products to online websites, including AppleInsider and PowerPage. Both sites published the information, which was about a product codenamed “Asteroid” or “Q7”, a FireWire audio interface for GarageBand. The information posted by one of the bloggers contained an exact copy of a detailed drawing of the product and a verbatim recitation of its technical specifications, both of which had been taken from a confidential set of slides labeled “Apple Need-to-Know Confidential.”

During the course of expedited discovery, the court granted Apple’s request to permit it to pursue limited discovery – namely, to subpoena emails that might reveal the identities of the source or sources for the information – from Nfox, the email service provider for PowerPage. Although Nfox did not object to the subpoena, the bloggers moved for a protective order, claiming to be journalists. They argued that their publication of this information was protected “free speech” under the First Amendment or privileged under California’s shield law. Apple countered that taking and disseminating its trade secrets violated California law – both the Uniform Trade Secrets Act, Civil Code §§3246, and the California Penal Code §499c – and that the bloggers had no right to anonymous speech.

The court declined to issue a protective order, holding that “the United States and California Supreme Courts have underscored that trade secret laws apply to everyone regardless of their status, title or chosen profession. The California Legislature has not carved out any exception to these statutes for journalists, bloggers or anyone else.” Accordingly, it held that the trade secrets qualified as stolen property which had been “fenced” by the bloggers whose identities should not be protected because, among other things, “[w]ithout this discovery Apple’s case will be crippled, since it will not know the defendants upon whom it should serve process.”

New Jersey
One Riverfront Plaza
Newark, NJ 07102
Tel: 973-643-7000
Fax: 973-643-6500

www.sillscummis.com

New York
30 Rockefeller Plaza
New York, NY 10112
Tel: 212-643-7000
Fax: 212-643-6550