

This is an advertisement.

# Management Update

## Casualties of War – The Rights of Disabled Service Members Under USERRA

One of the lesser-reported aspects of the on-going wars in Iraq and Afghanistan is the number of U.S. service members who have been seriously injured or wounded in fighting. According to the Pentagon, over 6,200 U.S. service members have been injured since the start of the Iraqi war alone. Fortunately, advances in body armor, coupled with rapid medical evacuations, have allowed service members to survive wounds that would have been fatal in previous wars. Many of these individuals have now been added to the rolls of the working disabled.

Employers' knowledge of the rights of disabled returning service members under the Uniformed

Services Employment and Reemployment Rights Act (USERRA) is generally not as well developed as the knowledge of the standard reemployment issues for uninjured military service members. USERRA provides broad protections for disabled service members. As most employers know, returning service members have a set period of time in which to report back to work to preserve their USERRA reemployment rights. For example, service members called to active duty for more than 180 days must submit their application for reemployment within 90 days of the completion of their military service. Service members gone for 30 days or less are required to report back to work "not later than the beginning of the first full regularly scheduled work period" after a period of eight hours

*Continued on page 5* ▶

### DOL Issues Proposed Regulations Interpreting USERRA

On September 20, 2004, the Department of Labor (DOL) published draft regulations in the Federal Register that interpret the Uniformed Services Employment and Reemployment Rights Act (USERRA). While the proposed regulations do not significantly alter the existing interpretations of USERRA, the DOL has attempted to clarify certain areas of the law. For a more detailed discussion of the DOL's proposed regulations, please go to <http://www.fordharrison.com/fh/news/articles/20041005userra.asp>.

The full text of the proposed regulations can be accessed at [http://www.regulations.gov/AGCY\\_VETERANSEMPLOYMENTANDTRAININGSERVICE.cfm](http://www.regulations.gov/AGCY_VETERANSEMPLOYMENTANDTRAININGSERVICE.cfm). The DOL will accept comments on the proposed regulations until November 19, 2004. ■

### IN THIS ISSUE

- **RIGHTS OF DISABLED SERVICE MEMBERS** 1
- **PROPOSED USERRA REGULATIONS** 1
- **RECERTIFICATION UNDER FMLA** 2
- **JOINT EMPLOYER ISSUES UNDER NLRA** 3
- **NEGATIVE JOB REFERENCE SUPPORTS RETALIATION CLAIM** 4
- **F&H FIRM CONFERENCE** 5

# DOL Opinion Letter Addresses When Employers Can Seek Recertification Under FMLA

The Wage and Hour Division of the Department of Labor (DOL) recently issued an opinion letter regarding when an employer can seek recertification under the Family and Medical Leave Act (FMLA) when the original medical certification did not specify a minimum duration of incapacity and the employee has a pattern of absences on Mondays and Fridays.

The letter states that, under the FMLA, an employer can request recertification of an employee's medical condition every 30 days for pregnancy, chronic, or permanent/long term conditions in cases where no minimum duration of incapacity is specified in the original medical certification. (The employer requesting the opinion letter cited four scenarios: 1) an employee's health care provider certified that her migraine headaches would last indefinitely; 2) an employee's health care provider certified a chronic, serious health condition (diabetes) and provided no time frame for the duration of the condition; 3) an employee's chronic, serious health care condition (asthma) is certified to last for an indefinite period with possible episodes of incapacity over a three month period; and 4) the employee's certification of asthma specifies an indefinite period but indicates a need for breathing tests and treatments to be conducted over the next three months.)



The DOL stated that the recertification must be requested in connection with an absence. The employer can request recertification more frequently than every 30 days if there has been a significant change of circumstances or if the employer has reason to doubt the continuing validity of the certification.

The opinion letter also stated that a pattern of Monday/Friday absences can cast doubt on the employee's stated reason for the absence if there is no evidence of a medical reason for the timing of the absences. The DOL stated that a recertification could be justified, for example, if a medical certification indicated the need for intermittent leave for two or three days a month and the employee took such leave every Monday or Friday.

The DOL further stated that the FMLA does not prohibit an employer from including a record of an employee's absences along with the medical certification form for the health care provider's consideration in determining the employee's likely period of future absences. Nor does the FMLA prohibit an employer from asking, as part of the recertification process, whether the likely duration and frequency of the employee's incapacity due to the chronic condition is limited to Mondays and Fridays.

While DOL opinion letters do not have the effect of law, the opinion letter is informative. Courts will usually defer to the agency's opinion in cases in which the law or regulations are ambiguous. If you have questions regarding this issue or other employment-related issues, please contact the Ford & Harrison attorney with whom you usually work. ■

**Coming March 17-18, 2005**

**A Program for Remaining Union Free**

**"Labor Relations: Management Training for the 21st Century"**

For more details, contact Dori Feinman at 404-888-3987 or [dfeinman@fordharrison.com](mailto:dfeinman@fordharrison.com).

# When One Plus One Equals One

It comes as no great surprise to companies who have tangled with joint-employer issues that in labor law, sometimes one plus one equals one. That is to say, in some circumstances, the National Labor Relations Board (NLRB) will look at one company, then another, and resolve that they, in effect, add up to single or joint employer rather than two separate employers. This outcome is becoming more prevalent as employers rely more frequently on temporary employment agencies, or employee leasing companies, to staff positions. Thus, in some cases, union elections, for instance, temporary employees employed by a leasing company and the regular employees of the company who uses the leasing company may be treated as a single bargaining unit for election purposes, despite being employed by separate companies.

For instance, let's say an excavation company uses temporary employees from an employee leasing company, along with its regular employees, on excavations jobs. A union targets the excavation company employees for an organizing drive. The union determines its chances of prevailing in the representation election are increased if the temporary employees are included in the bargaining unit and permitted to vote. So, the union files a petition for election with the NLRB naming the excavation company and the leasing company as joint-employers of the proposed bargaining unit. Would the NLRB in a case like this permit a single bargaining unit to include employees from two separate employers? It depends.

The NLRB has said, "to establish that two employers are joint employers, the entities must share or codetermine matters governing essential terms and conditions of employment." *M.B. Sturgis, Inc.*, 331 NLRB 1298 (2000). This means that the two employers must each have a meaningful say in matters relating to the employment relationship of the employees at issue, such as hiring, firing, discipline, supervision, and direction. So, in our example, the question becomes do the excavation and leasing company both exercise control over the employees in the proposed bargaining unit? Do they both have a significant say in such

matters as making work assignments, supervising job performance, establishing pay rates, and disciplining employees? If so, then chances are they will be regarded as joint employers. If not, then they will not be regarded as joint employers and the NLRB will not permit the temporary and regular employees to form a single bargaining unit.

Recently, an employee leasing company client of Ford & Harrison found itself in just such a position. The client provided temporary staff to an excavation company. A union filed a petition for election with the NLRB, and, in an effort to join the client's employees with the excavation company's employees to form a single bargaining unit, named the client and excavation company as joint-employers. The client wanted no part of the election and maintained it was not a joint-employer with the excavation company because it did not control the employment terms and conditions of the excavation company's employees. The client asked Ford & Harrison to proceed to a representation hearing before the NLRB and seek to have the petition amended to exclude the client as an employer. Before the hearing, Ford & Harrison successfully negotiated a resolution whereby the union voluntarily agreed to amend the petition to delete the client as an employer. The client was dropped from the election process, thereby avoiding the time, expense, and aggravation of a representation hearing, briefing legal arguments to the NLRB, and possibly an election.

The NLRB's joint-employer rule is not limited to employee leasing companies and companies that use them, but also may apply in any instance where two separate employers share sufficient control over each other's employees.

If you have any questions regarding this issue or any other labor or employment-related issue, please contact Peter Munger, the author of this article, at [pmunger@fordharrison.com](mailto:pmunger@fordharrison.com), (303) 592-8864, or the Ford & Harrison attorney with whom you usually work. ■



# Federal Court Finds Negative Job Reference Supports Retaliation Claim

Reversing the decision of a federal trial court, the Tenth U.S. Circuit Court of Appeals has held that a negative job reference is a sufficient adverse employment action to support a claim for retaliation in violation of Title VII. See *Hillig v. Rumsfeld*. In *Hillig*, the plaintiff filed two discrimination charges against her supervisors at the federal agency for which she worked. These claims were settled and the plaintiff later applied for a job with the Department of Justice (DOJ), which she claimed she did not receive because her supervisors gave her negative job references. After she did not receive the DOJ position, Hillig sued her employer for, among other things, retaliation in violation of Title VII.

At trial it was shown that one of the supervisors, who had been the subject of Hillig's discrimination complaint, told a DOJ representative that Hillig had performance problems. The supervisor also described Hillig in derogatory terms to an EEO investigator.

The jury found in favor of the plaintiff and awarded her \$25,000. Despite the jury's award, however, the trial judge entered judgment for the employer, finding that the plaintiff failed to show that she had suffered an adverse employment action as a result of the retaliation because she

could not prove that the DOJ would have offered her the job but for the negative reference. Hillig appealed to the Tenth Circuit, which reversed the trial judge's order and reinstated the jury's verdict.

One of the elements of a claim for retaliation under Title VII is that the plaintiff must have suffered an adverse employment action. The Tenth Circuit held that an act by an employer that does more than *de minimus* harm to a plaintiff's future employment prospects can, when considered in light of the unique facts of the case, be regarded as an adverse employment action for the purposes of a retaliation claim. The Tenth Circuit held that this is so even if the plaintiff cannot show that the allegedly retaliatory act precluded a particular employment prospect.

Not all courts follow the Tenth Circuit's reasoning on this issue. The Ninth, District of Columbia, and Third Circuits have reached similar conclusions while the Second and Eleventh Circuits have required plaintiffs to show that the negative reference caused or contributed to the prospective employer's rejection of the plaintiff.

Regardless of whether the courts in a particular jurisdiction follow the Tenth Circuit's reasoning

on retaliation claims, employers can take proactive steps to protect themselves from litigation by developing a centralized employment reference procedure. This process should include instructing managers or supervisors to direct any reference requests to the appropriate human resources personnel, ensuring that the information in the employee's personnel file is accurate and up to date, having employees sign a release for references, and requiring reference requests be made in writing if possible.

Many states have enacted laws that protect employers from liability for honest reference information provided in good faith to a prospective employer. Having a procedure in place for providing references can help employers take advantage of such laws. If a human resources manager had provided the reference in *Hillig* instead of a supervisor who had been the subject of the plaintiff's EEOC charge, the employer might have avoided liability in that case.

If you have any questions about providing employment references or establishing a reference procedure or any other labor or employment-related issues, please contact the Ford & Harrison attorney with whom you usually work. ■

## ► *Rights of Disabled Service Members* - Continued from page 1

for safe transportation. 38 U.S.C. § 4312(e).

However, these reporting requirements are lengthened for service members who have been hospitalized or are convalescing from an illness or injury incurred or aggravated by military service. These individuals have up to an additional two years to recover from their injury or illness before they must apply for reemployment. 38 U.S.C. § 4312(e)(2). Additionally, the two-year period may be extended for circumstances beyond their control, for instance if reporting back is impossible or unreasonable.

Disabled service members also have special rights with respect to the position in which they are to be reemployed upon their return from service. Under USERRA there is an "escalator" provision that requires a returning service member to be placed in a position of employment as if he or she had never been called to active duty. Individuals who have incurred or aggravated a disability during their military service and cannot be reinstated into the position called for under USERRA, even after reasonable accommodation efforts, still have reinstatement rights under USERRA.

USERRA requires these individuals to be placed in "any other position which is equivalent in seniority, status and pay, the duties of which the person is qualified to perform or would be qualified to perform with reasonable efforts by the employer" or, if they cannot be placed in such a position because of their disability, "in a position which is the nearest approximation to such a position . . . in terms of seniority, status, and pay consistent with circumstances with such person's case." 38 U.S.C. § 4313(3). USERRA's reasonable accommodation requirement is similar to that

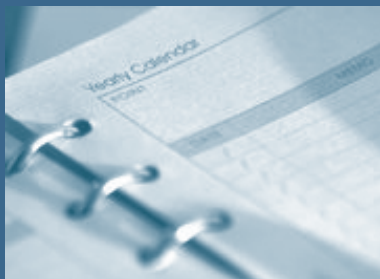
found in the Americans with Disabilities Act (ADA); however, even employers who are too small to be covered by the ADA are subject to USERRA.

A final issue for an employer to consider with regard to disabled returning service members is health benefits. Under USERRA, any service member, regardless of disability status, who was enrolled in an employer-sponsored health plan when called to active duty, is entitled to reinstatement to the plan upon return from service. This reinstatement is required if the employee so chooses and no waiting period may be imposed. (In essence, a returning service member cannot be forced to wait for an open enrollment period before being reinstated into the health plan.)

Interestingly, illnesses and injuries incurred or aggravated by military service do not have to be covered by the employer's health plan. Presumably these illnesses and injuries will be covered by Veterans Affairs because the determination of what is an excludable illness or injury is determined by the Secretary of Veterans Affairs. 38 U.S.C. § 4317(b)(2).

With the advances in medicine and prosthetics, hopefully service members who have been seriously injured or wounded while serving their country will be able to return to work without terrible hardship to themselves or their civilian employers. However, employers are well served to know what the law requires.

If you have any questions about this issue or other USERRA-related issues, please contact the Ford & Harrison attorney with whom you usually work or the author of this article, John Lowrie, [jlowrie@fordharrison.com](mailto:jlowrie@fordharrison.com), (303) 592-8860. ■



## Mark your calendars for the Ford & Harrison Annual Labor & Employment Client Conference

Atlanta - May 5-6, 2005

Orlando - May 12-13, 2005

More details coming soon.

*This is an advertisement.*

# MANAGEMENT UPDATE

FORD & HARRISON LLP  
Creative Workplace Solutions  
1275 Peachtree Street, N.E. • Suite 600  
Atlanta, Georgia 30309

*This is an advertisement.*

*The Management Update* is a service to our clients providing general information on selected topics. Clients are cautioned not to attempt to solve specific problems on the basis of information contained in an article. For information, please call Lynne Wingate 404-888-3858 or write to the Atlanta address below.

Editor Amy W. Littrell  
allittrell@fordharrison.com

FORD & HARRISON LLP  
Creative Workplace Solutions

1275 Peachtree Street, N.E. • Suite 600  
Atlanta, Georgia 30309  
404-888-3800 • FAX 404-888-3863  
225 Water Street • Suite 710  
Jacksonville, Florida 32202  
904-357-2000 • FAX 904-357-2001  
100 S.E. 2nd Street • Suite 4500  
Miami, Florida 33131  
305-808-2100 • FAX 305-808-2101  
1128 Lamar Ave.  
Oxford, Mississippi 38655  
662-238-7785 • FAX 662-234-4270

2100 Third Avenue North • Suite 400  
Birmingham, Alabama 35203  
205-244-5900 • FAX 205-244-5901  
350 South Grand Avenue • Suite 2300  
Los Angeles, California 90071  
213-237-2400 • FAX 213-237-2401  
100 Park Avenue • Suite 2500  
New York, New York 10017  
212-453-5900 • FAX 212-453-5959  
101 E. Kennedy Blvd. • Suite 900  
Tampa, Florida 33602-5133  
813-261-7800 • FAX 813-261-7899

1675 Broadway • Suite 2150  
Denver, Colorado 80202  
303-592-8860 • FAX 303-592-8861  
6750 Poplar Avenue • Suite 600  
Memphis, Tennessee 38138  
901-291-1500 • FAX 901-291-1501  
300 South Orange Avenue • Suite 1300  
Orlando, Florida 32801  
407-418-2300 • FAX 407-418-2327  
1300 19th Street, N.W. • Suite 700  
Washington, DC 20036  
202-719-2000 • FAX 202-719-2077

Certification as a Labor and Employment Law Specialist is not currently available in Tennessee.  
**Visit our web site at [www.fordharrison.com](http://www.fordharrison.com)**