



LONGER MILITARY TOURS Create New Issues



Marty Conway

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The deployment time for employees called back to duty in the military reserve or national guard, has increased to nine months since Desert Storm, and is now up to two years. One area creating significant litigation over the years is how to handle the returning reservist in departments that have been reorganized or downsized. The regulations

generally require reinstatement, but there is a loophole in the proposed regulations stating that an employer is not required to re-employ a returning service member if the employer's "circumstances have so changed that to make such re-employment impossible or unreasonable."

Another provision often raising legal questions, is the so-called "escalator principle" of the law, which entitles employees to positions or levels of seniority they would have achieved "if not for the period of military service." There are no rights in the law for temporary workers or new hires taking over the reservists jobs, and so returning reservists have superior rights.

New legislation passed on December 10, 2004, amends the Uniformed Services

Employment and Re-Employment Act. The major feature of the amendment is Section 4317, which now mandates that employers provide elective continuation of employer-sponsored health insurance, similar to COBRA, for those who would otherwise lose these benefits as a result of their absence from the workplace while in active service. However, in contrast to COBRA, this USERRA Amendment is not limited to employers of a certain minimum size, and further extends the maximum COBRA-like coverage from eighteen to twenty-four months.

The amended USERRA now requires the employer to post a notice of veterans' rights. This notice must be posted where the company normally posts other such notices. This posting obligation went into effect on March 10, 2005, and the draft text of the required notice, which is undergoing final Department of Labor clearance, is currently available on the Veterans' Employment and Training Service section of the DOL's website at www.dol.gov/vets. The DOL advises that for the time being, the draft USERRA notice is the only "official version" available, and can be posted by employers until the final version is approved.

KNOW YOUR ATTORNEY

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WAL-MART PAYS \$11 MILLION For Illegal Workers



During March, Wal-Mart agreed to pay a record \$11 million in civil fines, ending a federal probe into its use of illegal immigrants to clean floors at stores in 21 states. The federal investigation began in 1998 and resulted in an October 2003 raid encompassing 21 states and sixty stores.

Michele Castagna

An employer can face severe criminal penalties for knowingly hiring illegal immigrants and . . .

The raids led to the arrest of 245 allegedly illegal immigrants, and among those arrested in the raids were 8 people who worked for Wal-Mart itself. A Wal-Mart spokesperson said the eight had been hired from four cleaning companies as Wal-Mart began to clean its floors with its own workers. The spokesperson said those workers had documents that appeared to be valid and said the law prevented the company from challenging those documents "We were between a rock and a hard place," the spokesperson said. Most of those arrested in the raid were cleaning crew contractors and their employees, and lawyers for some of the workers in the crews claimed they worked as many as seven days a week, were not paid overtime and received no injury compensation.

An employer can face severe criminal penalties for knowingly hiring illegal immigrants and failing to comply with certain employee record-keeping regulations. As a general rule, the burden is on the contractor to meet the requirements, rather than the entity. Wal-Mart's spokesperson stated that no executives or mid-level managers knew the contractors had hired illegal immigrants.

An unusual aspect of the settlement is that it requires Wal-Mart to create an internal program to insure future compliance with the immigration laws by Wal-Mart contractors and by Wal-Mart itself. In the future, Wal-Mart will not employ outside contractors that clean its floors, companies that do contract work for other tasks will have stricter rules to follow to win those contracts, and upper management will have to approve contracts of more than \$10,000.00.

EVEN ASKING EMPLOYEE TO VOLUNTARILY TAKE POLYGRAPH VIOLATES The Law



A private contractor for the Department of Defense violated the Employee Polygraph Protection Act when it requested that all seven (7) of its employees take a voluntary polygraph examination, even though no test was ever administered and no adverse action was taken against the employees. *Polkey v. Transtecs Corp.*, 20 IER Cases 1058 (C.A. 11,

Mary Dee Allen

The appeals court upholds the lower court ruling that a request to take a polygraph exam alone constitutes an EPPA violation.

2005). The private contractors' operation of a mail room at a Naval Base - where open and undelivered mail was found in a waste basket - under a DOD contract that provided for a "secret" clearance did not permit it to administer lie-detector tests



POLYGRAPH continued from page 2

pursuant to the national-defense exemption, which applies only to the federal government's administration of tests in the performance of any counter-intelligence function, the court ruled. After the mail room employees denied opening the mail, the employer held a meeting with the employees requesting that each of them submit to a polygraph exam on a voluntary basis. The employees expressed concern over the reliability of polygraph exams, and refused to submit to the exam. Later, one of the employees was fired, supposedly for another reason, and a lawsuit resulted.

The appeals court upholds the lower court ruling that a request to take a polygraph exam alone constitutes an EPPA violation. Under the EPPA, it is unlawful for a covered employer to "directly or indirectly, require, request, suggest, or cause any employee . . . to take or submit to any lie detector test." 29 U.S.C. §2002 (1). The court also addressed a limited exception that the EPPA's prohibitions do not prohibit a covered employer from requesting a polygraph exam, where the employer demonstrates that: (i) the test is administered in connection with an ongoing investigation involving economic loss or injury to the employer's business; (ii) the employee had access to the subject of the investigation; (iii) the employer has a reasonable suspicion as to the employee's involvement in the loss, and (iv) the employer provides the employee with a signed written notice that specifically identifies the economic loss at issue, indicates that the employee had access to the property being investigated, and describes the basis for the employer's reasonable suspicion. 29 U.S.C. §2006 (d)(1-4). The court found that the employer's reliance on the ongoing investigation exemption failed because it could not satisfy its burden of establishing reasonable suspicion of the plaintiff's responsibility for the incident. While the statute does not clarify what constitutes a "reasonable suspicion," the regulations defined it as "an observable, articulable basis in fact which indicates that a particular employee was involved in, or responsible for, an economic loss." 29 C.F.R. §801.12 (f)(1). Access to the property and potential opportunity, standing alone, cannot constitute reasonable suspicion.

Editor's Note: There is little case law interpreting the EPPA because most employers have eliminated using the polygraph. Many employers are surprised to find that there is a limited exception whereby the polygraph may be used, where there is an ongoing investigation involving economic loss or injury to the employer's business, and the employer has reasonable suspicion that the employee was involved, and other requirements are met. Even in that instance, however, advice of counsel is necessary. The use of even an invitation to use the polygraph can create a cause of action against an employer, whereby the law would not necessarily be violated if the employer went ahead and took disciplinary action against the employee based on its suspicion of theft or other loss.

SOURCES OF INFORMATION

For Background Checks



Most experts believe that a significant portion of applicants cheat on their employment applications by misrepresentations or omissions. Further, negligent hiring and negligent retention

Patty Wheeler principles under state law are increasingly demanding diligence . . .

where employees have security responsibilities, operate motor vehicles, or have access to minors or disabled persons. Employers would have similar interests where employees have access to company property or funds.

One of the most common types of background checks is for credit history. There are various background check services that go way beyond credit history, including ADP (<http://www.adphire.com/services.htm>); Acxiom (<http://www.acxiom.com>); ChoicePoint (<http://www.choicepoint.com>); Hire Right (<http://www.hireright.com>); and Kroll Background America (<http://www.krollworldwide.com>). An important consideration on such background checks by third parties is to comply with the federal Fair Credit Reporting Act requirements.

Drug and alcohol testing is mandated by Department of Transportation rules for interstate drivers, and many states regulate other aspects of drug and alcohol testing.

There is no single, centralized data base for criminal records in the U.S., and there are numerous sources of federal, state, and county criminal records. In contrast, motor vehicle records can be checked in all fifty states through a single request to the motor vehicle agency of any one of them. Similarly, federal law now requires the states to maintain registries of sex offenders. Thirty-five states now have this information available to the public on-line. For a list of on-line registers, see <http://www.fbi.gov/hg/cid/cac/states.htm>.

A social security background check will not only confirm the applicant's use of a valid social security number, but will also provide prior addresses for the past seven (7) years.

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**Labor & Employment Law Conference
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EMPLOYER REFERENCE CHECKING GETS A "Bum Rap"



Stacy Choate
... there are corrective steps an employer can take to protect against liabilities resulting from its giving references on former employees.

Some employers think they are between the "devil and the deep blue sea" concerning the subject of reference checking. They can be sued for defamation by their former employees if the facts are misrepresented.

On the other hand, they can face charges of negligent referrals should they fail to provide vital information about their former employee, and then a future employer is harmed. The risks vary among the states on these matters, since most of the rules have developed under state law.

To some extent these concerns are exaggerated. Very few states recognize negligent referral, so

the chances of an employer being sued for refusing to give a reference or giving a neutral reference is remote. Further, most states have laws providing a "qualified privilege" where a former employer cooperates in a reference check. This provides a defense to an employer by showing that the references either were true, or were made without malice. That is, the employer did not know the statement was not true.

Further, there are corrective steps an employer can take to protect against liabilities resulting from its giving references on former employees. The most common step would be to

provide forms to potential employees to sign in advance that would release employers from liability for requesting or providing references, or insist that a prospective employer provide such a release before references are given.

Federal law does come into play in one situation. The U.S. Supreme Court has upheld a retaliation charge against a former employer, where the plaintiff claimed that his former employer's negative reference was given in retaliation against him for filing an EEOC charge against it. Robinson v. Shell Oil Co. The Supreme Court held that Shell Oil's reference was an act of retaliation, and was covered by Title VII of the Civil Rights Act.

Although many employers choose to act conservatively and only give out neutral information such as dates of employment and positions held, many employers feel that reference checking is good policy, and if you don't give references, you can't get them either. It is advisable in such a situation to have a policy as to how references are handled, such as referring them to a specific individual to handle, deciding what type of release, if any, would be necessary, and knowing the type of information that will be released. It is also a good idea to review the personnel file before giving a reference, so that the employer has a reasonable basis for the reference it gives. In special circumstances, such as where an EEOC charge has been filed, advice of counsel should be sought.