205 North Tenth Street, Suite 300 · Boise, Idaho 83702
208.342.5522 · 866.ERISALAW
www.erisalawgroup.com

Plan Sponsors and Fiduciaries: Are You Safe From USERRA Litigation?

Jeffery Mandell, Esq.

For many of us ERISA attorneys, spotting future areas of litigation comes easy. Our challenge then often is to get the message out (and better yet, for it to stick) to employers, plan administrators, fiduciaries and other at-risk parties so that they are not the ones subject to the predictable inevitable lawsuits.

An example that readily comes to mind was the granting of very specific rights to spouses of participants which were enacted in the Retirement Equity Act of 1984. It was clear then that on account of inadequate advice, oversight or follow through in the retirement plan arena that some surviving spouses would not receive the death benefits to which they would be entitled, that some plans would pay death benefits to the wrong party, and that aggrieved spouses would sue and prevail, ultimately costing the employer unnecessary legal fees and in some cases double the death benefits.

That litigation ensues to this day with regularity, since shortly after 1984, the most typical occurrence involving a dispute between a second spouse and the children of the first spouse or other heir to the participant. Minor revisions to the plan, summary plan description, and/or most critically the template beneficiary designation and spousal consent forms, in most all cases would have averted any issues. Perhaps not surprisingly, these language flaws in these common documents still exist today more often than not!

A second ready example where future litigation was easily predicted involves rights that veterans have with regard to employee benefits and employment law matters. USERRA, the Uniformed Services Employment and Reemployment Rights Act of 1994, as amended, requires plan sponsors to take certain action to ensure that employees serving in the armed forces are provided certain benefits upon return to employment. There have been reported occasional lawsuits involving our returning veterans who are improperly denied benefits, but most recently two large class action cases have been reported. In these class actions the returning veterans claimed benefits that allegedly

the employers were required to but did not provide to them upon their reemployment. No doubt certain parties at these employers are kicking themselves for not paying greater attention to USERRA's easy provisions.

In very general terms, returning veterans must receive the employment and employee benefits they would have received if they had not left employment to serve our country. The type and amount of required benefits depend upon a variety of circumstances, including for example, the type of plans and benefits (*e.g.* FMLA leaves, vacation, employment, flex, retirement, etc.). As applied to all "qualified" retirement plans, in my view most plan documents pay insufficient lip service to USERRA (typically one sentence), and most summary plan descriptions also fail to effectively (or at all) communicate the matter, the result of which is that often neither the employer nor its employees are complying with it.

For more information regarding USERRA, please see below an excerpt from our November 2005 *ERISA News Brief*. Of course, additional guidance is also available. For information on other areas in ERISA that are prone to litigation, and when easy adjustments ameliorate that risk, whether it be regarding health plans, welfare, retirement or any other employee benefit, please let us know.

RECOGNITION

Jeffery Mandell has been named to *Best Lawyers in America 2014*. In addition, *Best Lawyers* has honored him as a 2014 *Lawyer of the Year*, a singular award. *The Best Lawyers* is widely regarded as the preeminent referral guide to the legal profession.

Jeff has been reappointed on behalf of Idaho before the Internal Revenue Service and U.S. Department of Labor on the *IRS Tax Exempt/Government Entities Pacific Coast Council* regarding employee benefit issues of national and local importance. He just returned from the annual meeting in Baltimore, where he always particularly enjoys the candid give-and-take with the government's top ERISA brass.

Finally, he has been elected as a Board member of The Group, Inc., a nationwide prominent group of experienced attorneys and ERISA professionals.

USERRA – Excerpt from ERISA Law Group's November 2005 *ERISA News Brief*:

(c) UPDATE ON RIGHTS OF YOUR EMPLOYEES CALLED FOR MILITARY SERVICE – NOTICE REQUIRED*

The Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA) applies to virtually all employers and gives rights to employees who leave their civilian jobs to serve in the "uniformed services." We are concerned that many employers may not be complying with this law. In brief, employees who perform service must be in the same position with respect to employment and benefits that they would have been in if they had not left to perform military service.

The Veterans Benefits Improvement Act of 2004 (VBIA) requires employers to give employees notice of their rights and employers' obligations under USERRA. The Department of Labor has published the text of the required notice. Employers may post the notice where employee notices are customarily placed. Alternatively, employers may give the full text of the required notice to employees in other ways, including handing or mailing the notice to employees or distributing through electronic mail. The notice is available in poster form from the Department of Labor's website (http://www.dol.gov/vets/) or from this law firm on request.

The uniformed services are broadly defined to include the regular armed services including the Coast Guard, the reserves, the National Guard, and the uniformed corps of the U.S. Public Health Service. In general and with a number of exceptions, if the employee gives advance notice of his or her deployment and serves for up to five years, he or she must be treated as if he or she is on a leave of absence.

- Reemployment. If the individual timely applies for reemployment upon his or her return from service, then he or she is entitled to the same job he or she previously had with the employer. He or she must be given the promotions and raises that he or she would have had if he or she had remained on the job while serving in the uniformed services, and be given any necessary training to qualify for that "escalated" job.

- Retirement plan contributions. USERRA applies to all types of retirement plans, including qualified and nonqualified plans, SEPs, SIMPLEs, 457s, and 403(b)s. If the individual returns to his or her job, the employee must be treated as employed (for up to 5 years) while in the service for purposes of eligibility, accrual and vesting, and must be credited with the employer's contributions that would have been made during his or her absence. This includes matching, profit sharing and money purchase contributions, and defined benefit accruals. For 401(k) contributions, the employee has a period of time

----

*This piece was drafted in 2005. It does not address developments since then, in particular including the HEART act which grants other important rights to veterans.

after reemployment (up to 5 years) to make these contributions. Earnings and forfeitures are not required to be credited to the employee. The compensation that must be used to calculate the contributions is the compensation that the employee would have earned if he or she had remained actively employed.

- Retirement plan loans. The maturity date of any loan from the plan is extended by the period of service, and the plan sponsor may design the plan to suspend loan repayments, although interest continues to accrue, during the period of service. A separate law, the Service members Civil Relief Act, requires that interest rates charged on loans to individuals in military service must be capped at 6%. The plan's DOL-required written loan policy must reflect the loan provisions as applied to servicemen.

- Health benefits. Even if the employer is too small to be covered by the federal COBRA law, the individual must be given the opportunity to pay for health benefits for up to 24 (formerly 18 before the VBIA) months of the period of military service. He or she has a right to be reinstated to health benefits upon reemployment without waiting periods or preexisting condition exclusions.

Summary plan descriptions must be amended to take into account USERRA and VBIA. Employees need to be informed that if they return to work, for even *one day*, then they are entitled to USERRA's ERISA benefits. This is very material information which, if omitted from the plan's SPD, would place the employer at risk for making up all of the missed contributions, including the 401(k) contributions, plus ongoing earnings thereon.

* * *

Please contact Jeffery Mandell (jeff@erisalawgroup.com) or John Hughes (john@erisalawgroup.com) at 208-342-5522 or 866-ERISALAW if you wish to discuss your plan specifics.

This Newsletter provides general information only and does not provide legal advice. The application of ERISA laws is complex. This material may be considered attorney advertising under court rules of certain jurisdictions.