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EMPLOYMENT & LABOR QUARTERLY NEWSLETTER

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BOARD MEETINGS

The Board meets the first Wednesday of each month. Section members are welcome at all meetings.

FILING CHARGES OF DISCRIMINATION – A PLAINTIFF’S PERSPECTIVE

J. Edward Hollington, Esq. - J. Edward Hollington & Associates, P.A.

A comprehensive discussion about filing discrimination charges with the Equal Employment Opportunity Commission and the New Mexico Human Rights Division. The article was written to remind regular employment law practitioners of the importance of the initial charge of discrimination, and to provide an outline for other attorneys who find themselves helping employees with such charges to ensure that the charge is timely and complete.

TOP TEN PRACTICE POINTERS FOR RESPONDING TO A CHARGE OF DISCRIMINATION

Ernestina R. Cruz, Esq., Duane Z. Padilla, Esq. - Narvaez Law Firm, P.A.

This article addresses the top ten practice pointers for attorneys responding to a charge of discrimination filed with the Equal Employment Opportunity Commission or the New Mexico Human Rights Division. Each charge of discrimination has its own special considerations; however, this list provides a useful, general outline for any practitioner responding to a charge of discrimination.

FINAL USERRA REGULATIONS ISSUED BY DOL

Danny W. Jarrett, Esq. and James L. Cook, Esq. - Noeding & Jarrett, P.C.

Final USERRA regulations were issued by the Department of Labor on December 18, 2005. The regulations provide important clarification and explanation of USERRA rights and obligations. The article summarizes USERRA provisions concerning: who is covered; who is an employee; who is an employer; joint employment; protected benefits; notice requirements; waiver of rights; reemployment rights; and the “escalator provisions” of USERRA.

EMPLOYMENT LAW UPDATE

Cindy Lovato-Farmer - Los Alamos National Laboratory, Office of Laboratory Counsel

Decisions on employment and labor law issues within the last three months. Review these updates at [http.....](http://...)

MESSAGE FROM SECTION CHAIR

CARLOS M. QUIÑONES

Dear Section Members:

Welcome to our second edition of the quarterly newsletter for the New Mexico State Bar Employment & Labor Law Section. I am honored to serve as Chair of the Section for 2006. We have outstanding Board members, and I look forward to working with everyone during my term.

I would like to solicit the input of Section members on three important topics. The first topic concerns Continuing Legal Education (CLE). Specifically, we would appreciate your input on (a) CLE topics for this year in the areas of employment and labor law; and (b) possible presenters at CLEs on employment and labor law topics.

The second area concerns our Section quarterly newsletter. The first edition was published in December 2005 and was favorably received. However, in order to make this a successful endeavor, we need future articles. Accordingly, we would invite your submission of a short article for publication in our quarterly newsletter. We would also invite you to propose potential contributors to a newsletter article.

Finally, we would like to ask you a general question: "What do you want from your Section?" We are certainly open to new ideas. For 2006, we are proposing a quarterly CLE in late spring or early summer, a presentation at the late July State Bar Convention, and our annual Balloon Fiesta October CLE on October 13, 2006. As in the last several years, we are also making a \$1,000 donation to the University of New Mexico Law School to promote a scholarship to a UNM Law School student who expresses an interest in employment and labor law.

Please send your suggestions and comments concerning the above topics to membership@nmbar.org. Thank you for your consideration.

FILING CHARGES OF DISCRIMINATION – A PLAINTIFF’S PERSPECTIVE

**By J. Edward Hollington, Esq.
J. Edward Hollington & Associates, P.A.**

Filing timely and complete charges of discrimination with state and Federal agencies are required before a plaintiff can file a lawsuit in Federal or State District Court. The charge must include each discrete act of discrimination. National Railroad Passenger Corp., v. Morgan, 536 U.S. 101 (2002). The U.S. Supreme Court continues to address statutory and administrative requirements under discrimination laws when it recently upheld a jury verdict for an employee where the defendant disclosed to the Court employment of less than 15 after the trial was concluded. Arbaugh v. Y and H Corp., 126 S. Ct. 1235 (2006). (held failure to allege minimum number of employees is not jurisdictional, and must be timely raised by employer as part of motion practice). This article is written to remind regular employment law practitioners of the importance of initial charge of discrimination, and to provide an outline for other attorneys who find themselves helping employees with such charges to insure that the charge is timely and complete. Practitioners are advised to consult excellent resources available on the EEOC’s website (www.eeoc.gov), and Rules and Regulations of NMHRD (9 NMAC 1.1, et seq).

The First Step

Federal anti-discrimination laws, and the New Mexico Human Rights Act (NMSA 1978) § 28-1-10A (2005) require that one file administrative charges before filing lawsuits based on allegations of discrimination. The charges of discrimination under Federal laws are filed with the EEOC, or with the New Mexico Human Rights Department (NMHRD) for claims of discrimination under the New Mexico Human Rights Act (NMHRA). New Mexico is a dual agency state, which means a charge of discrimination filed with the EEOC, or conversely with NMHRD, will be filed with the other agency. Mitchell-Carr v. Office of Professional Employees International Union, 1999-NMSC-025, 127 NM 282.

The contents of the charge of discrimination are critical to the future direction, and oftentimes success of litigation. It is recommended that Plaintiffs prepare a charge of discrimination with a similar approach to preparing a complaint for a lawsuit. Make sure all the necessary elements to establish a prima facie case are addressed in the charge, and anticipate an employer’s non-discriminatory rational with sufficient facts to demonstrate pretext.

The charge should be in writing, and under oath for Federal claims. 42 USC § 2000(e)-5(b). Amendments are freely allowed to correct technical defects. Peterson v. City of Wichita, Kansas, 880 Fed.2d, 1307, 1308 (10th Cir. 1989). Failure to allege the precise nature of the unlawful discrimination and a discriminatory motive precludes relief in Federal courts.

Large numbers of complaints are filed with both state and Federal agencies, and the investigators are responsible for large case loads. Since investigators are responsible for preparing the charge of discrimination, it is recommended that attorneys prepare an outline of the information required on the Charge of Discrimination form (EEOC form 5 (5/01)). This will make the investigator's initial job easier, and help expedite the filing of the charge. Attorneys should also provide the names of witnesses, and direct the investigator's initial employer inquiries to pertinent documents, records, and witnesses which will support the charge.

Where to File – EEOC or HRD?

Although New Mexico is a dual agency state, there are some important considerations in the initial decision of filing a charge with HRD or EEOC:

- a. **Number of Employees:** A minimum of 15 employees are required for most Federal discrimination claims, and NMHRA allows such claims with four or more employees. NMHRA was recently amended to allow claims for sexual orientation, and spousal affiliation. NMSA 1978, § 28-1-7A (2004). Sexual orientation claims require 15 or more employees, while spousal affiliation claims require 50 or more employees.
- b. **Employer v. Individual:** The Federal Discrimination Statutes generally do not permit charges against individuals, but require the charge to be filed against the employer. NMHRA permits charges against individuals as well as employers. (§28-1-2B (2003)).

PRACTICE TIP: Determining the name of the employer can sometimes be tricky. Try and obtain W-2 forms which are supposed to have the name of the employer for IRS purposes. Although Federal claims are allowed only against an employer, it is still important to identify the individual perpetrators and persons responsible for investigating and enforcing discrimination policies and procedures.

- c. **Class Actions:** Class actions may be filed with the EEOC, but not under NMHRA.
- d. **Time Limitations:** As a result of recent amendments to NMHRA, time limitations for filing charges and pursuing lawsuits now parallel the Federal requirements. Discrimination claims must be filed within 300 days of the last act of discrimination, and lawsuits/appeals in State District Court must be filed within 90 days of receiving letters of determination from HRD, and 90 days after receiving determinations and/or Right to Sue letters from the EEOC for filing in Federal District Court. (28-1-10A and 28-1-13A (2005)).

What to Put in the Charge of Discrimination

After completing the top portion of the EEOC form 5, which includes basic identifying information of employee and employer, addresses, phone number, number of employees, the particular type of discrimination, and the last date discrimination took place, the charge should contain sufficient facts to establish a prima facie case of discrimination. Below is an outline for the prima facie requirements of various discrimination laws. The following element for each particular charge of discrimination should be used for NMHRA complaints because New Mexico generally looks to Federal civil rights adjudication for guidance in interpreting NMHRA. Ocana v. American Furniture Company, 2004-NMSC-018, ¶ 23, 135 NM 539.

A. Title VII (Race, Color, Religion, Sex, or National Origin)

1. The person is a member of a protected group.
2. The person is qualified for the position or job they hold.
3. Adverse employment action has occurred, which is motivated in part by a discriminatory motive.
4. The person has suffered losses or damages.

Complaints should also anticipate the McDonald Douglas (411 U.S. 792, 802 (1973)), burden shifting, and include facts to dispute the employer's claim that the adverse action was done for a non-discriminatory reason. The facts should demonstrate that the employer's explanation is unbelievable, contradictory, implausible, or inconsistent. Reeves v. Sanderson Plumbing, 530 U.S. 133 (2000).

B. Age Discrimination Claims (ADEA)

1. The person is over the age of 40.
2. The person has been discharged, or other adverse employment action motivated in part by age.
3. The person is replaced with a younger employee (under the age of 40), or is younger than the charging party.
4. The person was qualified to do the job.

The McDonald Douglas burden shift also applies to ADA claims, and should be addressed in the complaint as discussed above.

C. Disability Claims (ADA)

1. The person has an impairment that substantially limits a major life activity.
 - a) Major life activity includes caring for ones self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working. Toyota Motor v. Williams, 534 U.S. 184 (2002), and

Bowen v. Inc Producing Management of OK, 202 F.3d 1282 (10th Cir. 2000), and 29 CFR 1630.2(i).

2. The person can perform with or without reasonable accommodations the essential functions of the employment position.
3. Discrimination has occurred against the person, i.e. adverse employment action motivated in part because of disability.

a) Reasonable Accommodation. If failure to provide such accommodation is an issue in your case, then include facts as follows:

- 1) The employee requested a reasonable accommodation. After a reasonable accommodation has been requested, employers are required to engage in interactive process with the employee to fashion a reasonable accommodation. (Martin v. Kansas, 190 F.3d 1120 (10th Cir., 1999), and Burchette v. Target Corporation, 340 F.3d 510 (8th Cir., 2003).

4. Special Problems for Disability Claims:

a) Remedial Measures. In determining if a person is a qualified individual under the ADA, one must take into account remedial measures (i.e, medications, support devices), or anything else that lessens the severity of the impairment and impact on major life activities. (See trio of U.S. Supreme Court cases, Sutton v. United Airlines, 527 U.S. 471; Albertson's v. Kirkingburg, 527 U.S. 555; and Murphy v. UPS, 527 U.S. 516 (1999). The 10th Circuit has held that the inability to perform a single, particular job does not constitute a substantial limitation on major life activity of working. Bolton v. Scrivner, Inc., 36 F.3d 939, 943 (10th Cir., 1994).

b) Regarded as Disabled. If a person does not meet the technical definition of a qualified individual, there still may be protection under the ADA if:

- 1) Has an impairment that does not limit major life activities, but is treated by the employer as having such a limitation;
- 2) Has physical or mental impairment that substantially limits a major life activity as a result of the attitude of others toward such impairment; or

- 3) Has no such impairment, but is treated by the employer as having a substantially limiting impairment. Gowesky v. Singing River Hospital Systems, 321 F.3d 503 (5th Cir. 2003, cert. denied, 124 S.Ct. 66 (2003)).
- c) Record of a Disability. This is a category of protection under the ADA which is commonly misunderstood. Simply having a record of a medical condition such as cancer or heart condition does not meet the requirements of a qualified individual under the ADA. One seeking relief under this section of the ADA must still establish an impairment that substantially limits one or more major life activities. EEOC v. R.J. Gallagher, 181 F.3d 645 (5th Cir. 1999), Sorenson v. University of Utah Hospital, 194 F.3d 1084 (10th Cir. 1999).

ADA claims are complicated, it is recommended that practitioners refer to the excellent resources provided by the EEOC through its various compliance manuals, and enforcement guidelines. (Visit www.EEOC.gov) for reference material regarding disability claims.

D. Sex Harassment / Hostile Work Environment

1. Member of protected group.
2. Subject to unwelcome sexual harassment.
3. The harassment is based on sex.
4. The harassment affects a term or condition of employment.

It is important to know if the harasser is a supervisor with immediate authority over an employee, because such may result in strict liability and/or vicarious liability. Farragher v. City of Boca Raton, 524 U.S. 775; Burlington v. Ellerth, 524 U.S. 742 (1998). Include in the charge of discrimination the name, identity, job description, and supervisory authority, if the harasser is a supervisor.

If the unwelcome sexual advances or harassment has resulted in a “tangible employment action,” i.e., termination, demotion, suspension, etc., the employer may be held to a strict liability standard. If there is unwelcome sexual advances, and/or sexual harassment that does not result in a tangible employment action, then the claim would be characterized as one of a hostile environment. The complaint must allege that the conduct, such as sexual advances, demeaning comments, were sufficiently severe or pervasive to create a hostile work environment. It must be more than an isolated comment or incident. If the harasser is not a supervisor, but a colleague, co-worker, or customer, or another non-employee, the complaint must specify that the employee reported the conduct to her supervisor or other persons responsible for enforcing harassment discrimination claims within the company. Farragher/ Ellerth, Id., and Lockard v. Pizza Hut, 162 F.3d 1062 (10th Cir. 1998). The complaint must also allege

that the employer did not exercise reasonable care to prevent and correct promptly any sexually harassing behavior. If the employer does not have a policy against sexual harassment and/or discrimination, then that employer would not be entitled to the Farragher/ Ellerth affirmative defenses.

Claims for Federal Employees

Be aware there are different administrative procedures and requirements for discrimination claims filed by Federal employees. The first step is a requirement that a contact be made with the Federal agency's EEO counselor within 45 days of the act of discrimination, or after the effective date of some personnel action related to discrimination. 29 CFR 1614.105(a)(1). The same details as discussed above for the various discrimination complaints should be included in the report to the EEO counselor of the particular Federal agency.

Practitioners should carefully review various Federal statutes and regulations for pursuing claims of discrimination for Federal employees. (29 CFR 1614.408(d)).

Contacts / Resources

1. HRD, Francie Cordova, Director, (505) 827-6838, (800) 566-9471
2. Loretta Medina, Senior trial attorney, EEOC, loretta.medina.eeoc.gov

The EEOC has recently undergone a reorganization and many southern New Mexico counties, including Grant, Hidalgo, Luna, Sierra, Otero, and Dona Ana are now included in the Dallas, EEOC District. The remainder of the state continues to be part of the Phoenix EEOC District.

Incomplete and untimely administrative charges may be fatal to an employee's valid claim of discrimination. Practitioners must understand the importance of these charges, and give sufficient attention to including the necessary elements and facts for a claim to proceed.

Finally, both state and Federal anti-discrimination laws provide for protection against retaliation. The prima facie case of retaliation should include:

1. An employee engaged in protected activity, i.e. objecting and/or reporting discrimination, participating in an investigation, or filing a charge of discrimination;
2. Adverse employment action motivated in part by retaliatory motive; and
3. Damages or losses. The McDonald Douglas burden shift applies to retaliation charges.

Top Ten Practice Pointers for Responding to a Charge of Discrimination

By:

Ernestina R. Cruz, Esq.¹

Duane Z. Padilla, Esq.

Narvaez Law Firm, P.A.

The Equal Employment Opportunity Commission (“EEOC”) and New Mexico Human Rights Division (“NMHRD”)² have jurisdiction over claims involving allegations of discrimination brought by employees in the state of New Mexico. This article addresses the top ten practice pointers for attorneys responding to a charge of discrimination filed with the EEOC or NMHRD.

1. Evaluation of the Charge. Prior to commencing an investigation or examining client documents, it is essential to review the charge of discrimination and supporting documents forwarded by the EEOC or NMHRD. It is important to note the following:
 - a) Preliminarily, it is necessary to determine the deadlines set by the agency. Typically, a deadline is listed for purposes of responding to the invitation to mediate the charge. To the extent insufficient time is provided for purposes of conducting your initial investigation, it is a good idea to contact the mediator to request an extension of the invitation to mediate deadline. Similarly, an extension request should be made of the agency if you require additional time to gather evidence that will be included in the response to the charge.
 - b) Each charge of discrimination includes a section wherein the charging party identifies the basis upon which the discrimination claim is asserted and a section within which the particulars of the claim are set forth. A charge of discrimination can be filed with the EEOC for age, race, color, sex, religion, gender, pregnancy, national origin, disability, and retaliation.³ The NMHRD has jurisdiction over the following additional categories: spousal affiliation, sexual orientation, pregnancy, housing, credit, ancestry, gender identity, serious medical condition and public accommodation.⁴ Identification of the category of discrimination will allow you to determine the scope of your investigation.

¹ This article was prepared by Ernestina R. Cruz, Esq. and Duane Z. Padilla, Esq. with the assistance of EEOC Area Director Georgia M. Marchbanks. The authors thank Ms. Marchbanks and the EEOC for their assistance. The information addressed in this article is not listed in order of importance nor does it represent an official position regarding representation of clients before the EEOC or NMHRD. No part of the article can be reproduced or used in any form without the express written consent of the authors.

² The City of Albuquerque Human Rights Board (“HRB”) likewise has jurisdiction over claims of discrimination brought by employees within city limits. The practice pointers outlined in this article are equally applicable to claims filed before the HRB.

³ The EEOC also has jurisdiction over claims involving the Equal Pay Act. See 29 U.S.C. § 206.

⁴ See New Mexico Human Rights Act, NMSA 1978, §§ 28-1-1 et. seq.

- c) Identify the dates within which the discrimination took place. Under Title VII of the Civil Rights Act of 1964 (“Title VII”), the New Mexico Human Rights Act, the Age Discrimination in Employment Act (“ADEA”), the Americans with Disabilities Act (“ADA”), and the Pregnancy Discrimination Act all provide that a charging party must file a charge of discrimination within three hundred (300) days of the underlying discriminatory act.⁵ In the event the charging party alleges the underlying discriminatory act took place beyond the three hundred day limitation period, you should make note of the untimely charge. However, anticipate that the agency will still require a full response to the charge and address the factual allegations and *prima facie* elements required to sustain the claim.
 - d) Other jurisdictional considerations. You will want to confirm that the employer has a sufficient number of employees to be made subject to the applicable statute under which the charge has been filed. Under Title VII and the ADA, the EEOC has jurisdiction over claims involving employers who employ fifteen (15) or more employees.⁶ However, the jurisdiction statutory minimum for claims involving the ADEA is twenty (20) or more employees and the Equal Pay Act (“EPA”) applies to most employers with one or more employees.⁷ Generally, jurisdiction over NMHRA claims will exist when an employer has four (4) or more employees.⁸
2. Conduct a thorough on-site investigation. Our experience has shown that conducting a prompt and thorough on-site investigation is the best way to evaluate the claims asserted by a charging party. Typically, this entails interviewing managers and supervisors who have information regarding the allegations set forth in the charge. In some cases, you will find that management has already conducted its own pre-charge investigation regarding the incident giving rise to the alleged discrimination. To the extent statements from other employees regarding the alleged discriminatory act are included in the employer’s investigatory file it is always a good idea to conduct your own follow-up interview with the employees who previously provided statements. Likewise, if managers or supervisors identify other employees with relevant information, this is the perfect opportunity to interview other potential witnesses. The on-site investigation is a good tool to utilize in determining the credibility of witnesses and gathering all documentary evidence pertaining to the charge. Obtaining and reviewing the personnel file prior to the on-site visit also tends to expedite handling of the initial investigation. A final benefit from conducting the on-site

⁵ See 42 U.S.C. § 2000e-5(e)(1) (Title VII and PDA); 29 U.S.C. § 626(d) (ADEA); 42 U.S.C. § 12117(a) (ADA).

⁶ See 42 U.S.C. 2000e(b).

⁷ See 29 U.S.C. § 630(b) (ADEA); 29 U.S.C. 216(b) (EPA).

⁸ See § 28-1-2, NMSA 1978. Jurisdiction over NMHRA spousal affiliation claims will exist only when employer have fifty (50) or more employees. See § 28-1-7(a), NMSA 1978. Additionally, sexual orientation and gender identity claims can be brought by employees only when employers have fifteen (15) or more employees. *Id.*

investigation relates to preservation of relevant evidence which can help the employer prevent future spoliation claims.

3. Mediation.⁹ Both the EEOC and NMHRA offer free mediation programs. This alternative dispute resolution mechanism affords employers the opportunity to resolve the issues addressed in a charge without incurring the cost of a time consuming investigation. During this time, the agency investigation is placed on hold. Participation in mediation does not constitute an admission of any violation of applicable law enforced by the agency. Pre-investigation settlement is particularly beneficial in matters involving unfavorable conduct by the charging party, other employees or the employer. The parties are able to circumvent the traditional agency investigative process and/or subsequent litigation. In the event the matter does not settle, the employer may obtain additional information from the charging party which may enable it to more effectively respond to the allegations in the charge.
4. Preparation of a response. The written position statement provides the employer with an opportunity to set forth its explanation of the non-discriminatory reasons for the action taken in reference to the charging party's employment. The position statement should include: (a) a summary of the allegations and a denial of the alleged discrimination; (b) a recitation of the facts¹⁰ related to the charge, including a thorough description of the charging party's employment history, the nature of the employer's business, and the charging party's job description; (c) a description of the employer's policies and procedures regarding its commitment to non-discrimination in the workplace; (d) a description of the employer's policies and procedures relating to the allegations of discrimination; and (e) a thorough analysis of applicable law pertaining to the *prima facie* elements of the claim and the non-discriminatory reasons for the employer's actions. Our experience has proven that treating the position statement like a motion for summary judgment tends to result in favorable disposition of the charge of discrimination.
5. Request for information/Questionnaire. The agency may request additional information from a respondent in a request for information (EEOC) or questionnaire (NMHRD). Such requests typically seek employer's policies, employee statements, personnel files, video evidence, lists regarding comparators, and other documentation perceived to be relevant by the agency. You should speak with the investigator if you have any concerns regarding the scope of the request for information. Limiting the scope of the request for information may be necessary where the investigator seeks voluminous documents, information over a significant time frame, or comparator lists which do not relate to the alleged discriminatory act. In some matters, the investigator will be willing to limit the

⁹Additional information regarding the EEOC's mediation program can be found at www.eeoc.gov/mediate/index.html

¹⁰ In support of the factual description, you should include copies of written employee statements and relevant portions of the charging party's personnel file.

scope of the agency's request or may seek to review limited documents during an on-site visit. Alternatively, you should raise relevant objections in your response to the request for information. This is also an opportune time to assert confidentiality to the extent the materials being produced require such protection.

6. On-site visit by the agency. In limited matters, the agency may request an on-site visit. Although the on-site agency visit may be disruptive to business operations, this should be viewed by employers as an opportunity to expedite the investigator's fact finding process and will assist in the timely resolution of the matter.¹¹ The on-site visit may also alleviate the burden associated with the production of voluminous documents requested by the investigator as s/he might ask to review the documents on-site. However, it is always important to be aware of confidentiality and trade secret considerations when producing any documents to the agency.
7. Conciliation.¹² Pursuant to federal law, the EEOC is statutorily mandated to attempt resolution of findings of discrimination through "informal methods of conference, conciliation, and persuasion."¹³ Once the parties have been informed of the evidence gathered in the investigation which establishes reasonable cause to believe that discrimination has taken place, the EEOC invites the parties to participate in voluntary conciliation of the matter.¹⁴ In the conciliation process, the investigator typically works with the parties "to develop an appropriate remedy for the discrimination."¹⁵ In this regard, the investigator takes on the dual role of mediator/facilitator. Conciliation includes negotiations between the parties and resolution of the matter between the EEOC and respondent. The EEOC may request that certain remedies be agreed to by the parties in the conciliation agreement which may require the employer to conduct additional training or policy revision. This is the final opportunity for the parties to resolve the claim informally and without incurring the cost of litigation.¹⁶
8. Professionalism. Developing a sound professional relationship with either the mediator or investigator is critical for purposes of ensuring proper resolution of the charge. Providing sufficient notice to the agency regarding delays in your investigation will ensure a good working relationship with the agency, both during the pending investigation and the handling of future matters. Cooperation is key!
9. Retaliation. In matters involving current employees, the employer should be reminded that they must not retaliate against the charging party for having filed a

¹¹ The EEOC provides additional information regarding its handling procedures during the investigation phase at www.eeoc.gov/employers/investigations.html.

¹² Information regarding the EEOC's conciliation process can be found by visiting www.eeoc.gov/employers/investigations.html#conciliation.

¹³ See 42 U.S.C. § 2000e-5.

¹⁴ See www.eeoc.gov/employers/investigations.html#conciliation.

¹⁵ Id.

¹⁶ Id.

charge of discrimination. Title VII prohibits retaliation against an employee who opposes any unlawful employment practices or files a charge with the EEOC.¹⁷ Likewise, employers must be cognizant of claims which might be filed by employees who are non-parties to the charge and either participate or refuse to participate in the underlying investigation. For example, Section 503 of the ADA provides, in pertinent part, that "no person shall discriminate against any individual because such individual has opposed any act or practice made unlawful by [the Act] or because such individual made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under [the Act]."¹⁸

10. Preventing future claims. Employers should recognize that, in some cases, a charge of discrimination provides them with an opportunity to re-evaluate policies and procedures regarding equal employment opportunities. In this respect, employers should be encouraged to implement or revise policies which are not in compliance with applicable law. Similarly, when warranted, employers should undertake efforts to train both management and hourly employees regarding applicable federal and state laws pertaining to the prevention of discrimination, harassment and retaliation in the workplace.

An interactive dialogue with the agency from the moment a charge is received through submission of a response to a charge of discrimination is beneficial for all parties appearing before the agency. Each charge of discrimination has its own special considerations; however, this list provides a non-exhaustive, general outline for any practitioner responding to a charge of discrimination before the EEOC or NMHRD.

¹⁷ See 42 U.S.C.S. § 2000e-3(a).

¹⁸ See 42 U.S.C. § 12203(a).

Final USERRA Regulations Issued by DOL

By Danny W. Jarrett, President and James L. Cook, Associate Attorney, Needing & Jarrett, A P.C.

The United States Department of Labor (DOL) published the Final Regulations¹ for The Uniformed Services Employment and Reemployment Rights Act of 1994² (USERRA) on December 18, 2005. The regulations took effect on January 18, 2006. The final regulations do not mandate any new legal obligations but they clarify and explain, in some cases for the first time, the legal obligations imposed by USERRA.

The final regulations provide text for a new poster that meets the USERRA posting requirements. They also clarify provisions concerning: who is covered, who is an employee and who is an employer, joint employment, protected benefits, notice requirements, waiver of rights, reemployment rights, and the escalator principle. This article summarizes the most important areas of the final regulations that will be of concern to employers and their counsel.

Who Is Covered?

In addition to employees who provide service in the traditional uniformed service branches (Army, Air Force, Coast Guard, Marine Corps, Navy, the reserve component of each branch, the National Guard, and the Public Health Service Commissioned Corps), the final regulations explain that members of the National Disaster Medical System (NDMS), an agency within the Federal Emergency Management Agency (FEMA), are also treated as members of the uniformed services for USERRA purposes when they are called to service in response to public health emergencies or to participate in authorized training.³

Normally, membership in the Reserve Officers Training Corps (ROTC) is not considered uniformed service. However, the final regulations note that “some Reserve and National Guard enlisted members use a college ROTC program” to qualify for commissioned officer status. Under these programs, individuals may be receiving active or inactive duty credit during ROTC training sessions and, in these cases, they would be qualified for USERRA reemployment and anti-discrimination protections. Even when not participating in training sessions that qualify for reemployment protection, all ROTC members qualify for USERRA’s anti-discrimination protection.⁴

Employers and their counsel should be aware of these distinctions to ensure that they know which employees qualify for USERRA protections and the circumstances of service under which those protections can be invoked by an employee.

Who Is An “Employee” Under USERRA?

USERRA defines “employee” broadly so that it can provide protection to a maximum number of returning service members. The final regulations emphasize that USERRA provides coverage to temporary, part-time, probationary, and seasonal employees, as well as full time employees. And, unlike the Fair Labor Standards Act (FLSA), there is no exclusion for executive, managerial, or professional employees. The final regulations explain that independent contractors are not covered by USERRA and

¹ 20 CFR Part 1002.

² 38 USC §§ 4301-4334.

³ 20 CFR §§ 1002.5 – What definitions apply to USERRA?

20 CFR § 1002.6 – What types of service in the uniformed services are covered by USERRA?

⁴ 20 CFR § 1002.61 – Does USERRA cover a member of the Reserve Officers Training Corps?

provide the key factors that will be considered to determine independent contractor status.⁵ It is important for employers to know that the examination of the key factors governing the relationship will control the determination of independent contractor status. A statement contained in a contract or other document in which a person is identified as an independent contractor rather than an employee will not control the determination.

The regulations also clarify the distinction between “brief, non-recurrent, with no reasonable expectation of continued employment” and “temporary or seasonal”. This distinction is important to employers since employees with no reasonable expectation of continued employment are not covered by USERRA’s reemployment provisions even though they are covered by USERRA’s discrimination and anti-retaliation provisions. Attorneys representing employers must know these distinctions since the burden is on the employer asserting this defense against a claim for reemployment.

Who Is An “Employer” Under USERRA?

The final regulations provide definitions concerning important terms and phrases that might be at issue in USERRA litigation. Employers and their counsel should be aware that the term “employer” is different from, and more broadly defined, than in the Americans with Disabilities Act (ADA), the Age Discrimination in Employment Act (ADEA), and Title VII of the Civil Rights Act (Title VII). The final regulations state that “any person, institution, organization, or other entity that pays salary or wages for work performed, or that has *control over employment opportunities*” is considered an employer, even though they are not directly responsible for paying wages to employees.⁶ DOL responses to comments concerning the final regulations noted two court decisions where individual supervisors have been held personally liable under USERRA. The regulations do clarify that an entity or person who performs “purely ministerial” functions such as maintenance of personnel files will not be considered an employer so long as they do not have any direct influence over employment related decisions.⁷

Thus, the final regulations make it clear that the actions of individual supervisors and managers can violate an employee’s USERRA rights and may subject individual supervisors and managers to personal liability in addition to any liability the employer may have. Company owners who are also managers should be aware that, in USERRA actions, the corporate liability shield may not shield them since, as an owner/manager, they clearly have control over employment and could be held personally liable for a USERRA violation. Employers should consider providing USERRA training for all supervisors and managers who have “control over employment” and may want to reexamine their liability insurance coverage and company policies regarding indemnification of employees, officers, or directors who have control over employment.

Joint Employers

Consistent with the final regulations’ broad definition of employer, an employee in one job may have two employers. The final regulations use the example of a security guard employed by a security company who is then assigned to the worksite of a customer of the security company. In this and similar scenarios, the actual employer, the security company, or the customer of the security company could violate the security guard’s USERRA rights if either entity caused the guard’s removal from his or her position because of uniformed service obligations.⁸

⁵ 20 CFR § 1002.44 – Does USERRA cover an independent contractor?

⁶ 20 CFR § 1002.5(d) – Definition of employer.

⁷ *Id.*

⁸ 20 CFR § 1002.37 – Can one employee be employed in one job by more than one employer?

The final regulations also define the situation under which a union hiring hall can be considered an employer under USERRA. If the hiring and job assignment functions have been delegated to the hiring hall by an employer, then the hiring hall is considered the employee's employer under USERRA and the hiring hall will have reemployment responsibilities along with the employer using the hiring hall's services. The final regulations specify that USERRA's anti-discrimination and anti-retaliation provisions also apply to the hiring hall.⁹

Companies and sole proprietorship businesses must be aware of their USERRA obligations even if they have no "employees" and only use labor supplied by temporary labor firms because they will also be considered employers under USERRA.

What Benefits Are Protected?

Employers must offer the employee the opportunity to continue coverage under the employer's health insurance plan and, if the employee's uniformed service is for 31 days or more, the employer can require the employee to pay the full premium plus a 2% administrative fee. The final regulations clarify that if the employee's uniformed service is less than 31 days, the employer cannot require the employee to pay more than the employee's regular cost for coverage. The final regulations further clarify that USERRA does not compel an employer to establish a health plan or allow the employee to initiate coverage under a health plan if the employee was not already covered by the employer's plan.

The final regulations also explain circumstances under which an employer may not be required to continue, or may cancel, health plan coverage for the employee. The key issues involve employees who do not provide notice of service and/or do not elect continuation of coverage. Employers should become familiar with this area of the final regulations since they contain a number of interrelated issues that may affect what an employer can or must do regarding health insurance benefits.¹⁰

Notification Of Service

The final regulations also clarify the notification that the employee is required to give the employer prior to a service-related absence. While there is no minimum required amount of notice that must be given, the Department of Defense expects that service members will exercise care, when they are able, to provide employers sufficient notice of absence. Notification may be verbal or in writing and the service member does not have to request permission from the employer in order to be absent for service. If the serviceperson is employed through a multiple-employer referral service such as a hiring hall, then he or she must notify each employer of the impending service-related absence.

Because some service related deployments can be initiated with little or no notice to the employee, there may be little or no notice to the employer. Employers should be prepared for the sudden absence of an employee who may have uniformed service obligations requiring immediate deployment.

Waiver Of Rights.

No employee may waive his or her USERRA rights prior to or during service, even if the employee notifies the employer that he or she does not wish to return to work after service or enters into an agreement that contains a waiver provision. The final regulations do, however, provide that an employee may waive non-seniority rights and benefits if the employee provides the employer written notice of intent not to return to employment following his or her uniformed service. Even if written notice

⁹ 20 CFR § 1002.38 – Can a hiring hall be an employer?

¹⁰ 20 CFR § 1002.149-267.

of intent not to return is provided to the employer, the employee does not waive any other USERRA rights, including reemployment rights.¹¹

Nevertheless, even when there is written notice, the determination of whether the waiver is effective will be based on federal common law. The common law test is fact intensive and seeks to determine whether the employee's waiver is "explicit, knowing, voluntary, and uncoerced."¹² So, employers and their counsel should know that there is no way for an employee to waive most of the substantive USERRA rights and, even in the one area where waiver is allowed, non-seniority based rights and benefits, a court could determine that the waiver is ineffective.

Reemployment Rights Following Uniformed Service

The preliminary regulations stated that a service member who was honorably discharged had an unconditional right to reemployment even if he or she worked for another employer after completing military service. The final regulations, however, acknowledged that if a service member went to work for an alternate employer who was a competitor or the returning employee had a conflict of interest as a result of the alternate employment, the service member's alternate employment might violate the pre-service employer's legitimate employment policies. Such legitimate policies could include prohibiting concurrent work for a competitor or conduct that might be just cause for discipline. So, under the final regulations an employer may be able to discipline or terminate an employee if his or her alternate employment constituted cause for discipline or termination under the employer's policies.

USERRA also grants members of the uniformed services a reasonable amount of time to recover, recuperate, and readjust to life after the service period terminates. The amount of time granted is dependent upon length of service, and may include a recuperation period of up to two years for uniformed service related injuries. After recuperation, the service member may invoke his or her USERRA rights and seek reemployment with their pre-service employer.

Employers may not have to reemploy the former employee if the employer can establish that: 1) assisting the employee to become qualified for reemployment would impose an undue hardship;¹³ or 2) the employment position vacated was for a brief, nonrecurrent period with no reasonable expectation of continued employment. However, the final regulations are clear that the employer cannot refuse to reemploy the returning service member even if the employer must terminate a replacement employee. The final regulations also clearly state that the employer bears the burden of proof to establish these defenses against the returning service member's reemployment rights. Employers should have their counsel review existing employment policies to ensure compliance with USERRA.

The Escalator Provisions¹⁴

Probably the most difficult obligations for employers under USERRA are the "escalator provisions." In addition to the right to be reemployed, USERRA provides that, in most situations, the reemployment position must reflect the status and other benefits that the employee would have achieved had the employment not been interrupted by service. This means the employer will have to track things like seniority and automatic promotions, pay increases, or benefit increases based on length of employment for all former employees who leave employment for uniformed service.

¹¹ 20 CFR § 1002.152.

¹² 70 Fed. Reg. 75246, 75264 (Dec. 19, 2005).

¹³ 20 CFR § 1002.5(n) – Definition of undue hardship.

¹⁴ 20 CFR §§ 1002.191-213.

Employers must ensure that their personnel systems properly track the status and benefits of employees who have left employment for uniformed service so that, upon reemployment, the returning employee is placed in the same position he or she would have had if there had been no service-related interruption to employment. The final regulations clarify and explain the circumstances under which escalator provisions may or may not apply.

Discharge of a USERRA-Eligible Employee

Generally speaking, USERRA protects returning employees from discharge from civilian employment except for just cause. The prohibition is based on the amount of time the employee served in the uniformed services. If the employee served more than 30 days, he or she is protected from discharge for up to one year, unless based on cause. Those serving for less than thirty days are not afforded this protection, so long as the discharge is non-discriminatory.

Discharging a USERRA-eligible employee must be conduct-based or for other nondiscriminatory reasons. Such reasons might include the elimination of the employee's position, downsizing, and layoff, as long as they are not motivated by the employee's protected status as a member of the uniformed services. Conduct-based discharge must include some kind of notification advising the employee that his or her conduct is a justification for discharge. The final regulations clarify that such notice may be either express or implied.

Summary

The final USERRA regulations do not require employers to modify their employment policies. DOL has stated that it has confidence that the majority of the employers are already in compliance with the major provisions of the act. However, employers may want to review their employment policies and should be knowledgeable regarding their obligations to employees returning from uniformed service to avoid an unintentional USERRA violation that might result in costly litigation.

This article can only provide a brief overview of the final USERRA regulations. Employers and their counsel are encouraged to review the final regulations, which are available online at: <http://www.dol.gov/vets/regs/fedreg/final/2005023961.pdf>. Attorneys representing employers should read the *Section-by-Section Summary of the Final Rule and Discussion of Comments*¹⁵ that precedes the final rule in the *Federal Register* for additional background information and relevant case law relied upon by the Department of Labor.

¹⁵ 70 Fed. Reg. 75246, 75247 (Dec. 19, 2005).

EMPLOYMENT LAW UPDATE
Recent Decisions on employment law issues

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U.S. Supreme Court Cases

Ash v. Tyson Foods Inc., --U.S. -- , 126 S.Ct. 1195 (2006).

- Claims of race discrimination under Title VII and 42 U.S.C. Section 1981.
- Court vacated judgment by 11th Circuit Court of Appeals finding that the lower court erred in holding that modifiers or qualifications are necessary in all instances to render a disputed term probative of bias and in articulating a standard for determining whether the asserted nondiscriminatory reasons for defendant's hiring decisions were pretextual. Employer had called African American employee "boy". The Supreme Court stated: "Although it is true the disputed word will not always be evidence of racial animus, it does not follow that the term, standing alone, is always benign."

Arbaugh v. Y & H Corp., -- U.S. --, 126 S.Ct. 1235 (2006).

- Title VII case.
- Threshold number of employees (15) for application of Title VII to an employer is an element of a plaintiff's claim for relief, not a jurisdictional issue.
- Thus, issue cannot be raised at any stage of litigation and employer in a sexual harassment case who did not raise the issue until after adverse jury verdict waited too long to argue that it had too few employees to be covered by Title VII.

Tenth Circuit Court of Appeals

Title VII

Maldonado v. Altus, 433 F.3d 1294(10th Cir. 2006).

- Hispanic city street department employees alleged employer's English-only policy violated Title VII and 42 U.S.C. Section 1981 and 1983.

¹ The summaries and views expressed herein are those of the author, and not of the Los Alamos National Laboratory. The Los Alamos National Laboratory strongly supports academic freedom and a researcher's right to publish; therefore, the Laboratory as an institution does not endorse the viewpoint of a publication or guarantee its technical correctness.

- Ruling in favor of employer who implemented English-only policy reversed.
- Tenth Circuit held that a jury could reasonably find that the English-only policy had a disparate impact on Hispanic workers and trial court erred in concluding that employer had established a business necessity for the policy.
- Appeals court found the evidence of business necessity “scant” stating there was no prior written record of any relevant communications, morale or safety problems related to the use of a language other than English.

Reed v. Mineta, 438 F.3d 1063 (10th Cir. 2006).

- District court entered judgment on Title VII jury verdict for plaintiff and awarded prejudgment interest.
- Appeals court held that prejudgment interest should not have been calculated on entire back pay award from date of termination and remanded for recalculation.
- The court stated: “The purpose of making discrimination victims whole is limited, however, by recognition that prejudgment interest does not accrue until the victim actually sustains monetary injury.
- Although plaintiff was injured on date of termination, he did not actually suffer entire monetary injury at that time. Rather his monetary injuries were incrementally inflicted as each pay period passed and he went unpaid and prejudgment interest should have been calculated accordingly.

42 U.S.C. Section 1983

Perez v. Unified Gov’t of Wyandotte County, 432 F.3d 1163 (10th Cir. 2005).

- Denial of firefighter-defendant’s motion for summary judgment pursuant to qualified immunity is reversed.
- Defendant was responding to an emergency call and it was not alleged that defendant intended to harm plaintiff.

ADEA

Pippin v. Burlington Resources Oil and Gas Co., -- F.3d --, 2006 WL 337586 (10th Cir.).

- Employee terminated in RIFF filed age discrimination suit against his former employer.
- Court of Appeals affirmed district court’s decision granting summary judgment to employer.
- Appeals court found that the plaintiff failed to present sufficient evidence showing that employer’s proffered justifications for terminating him were a

pretext for age discrimination, stating that an employees own opinions of how a business should be run are insufficient to refute otherwise legitimate considerations.

- Court found the plaintiff also failed to establish evidence supporting a prima facie case of disparate impact applying the Supreme Court's recent decision in Smith v. City of Jackson, 544 U.S. 228 (2005).

Whittington v. Nordam Group Inc., 429 F.3d 986 (10th Cir. 2005)

- Discrimination claim under ADEA.
- The Tenth Circuit affirmed jury verdict for terminated 62 year old employee who was replaced by a 57 year old employee.
- Employer defended on the basis that 57 year old was not "substantially younger" than 62 year and therefore there was no evidence of discrimination.
- Court refused to set a bright line rule defining "substantial" age difference stating the amount of weight to be given a five year age difference was properly left to the jury.

New Mexico Supreme Court

New Mexico Human Rights Act

Juneau v. Intel Corp., 2006-NMSC-002, 139 N.M. 12, 127 P.3d 548.

- Claim of retaliation by employee implicated in an internal company sexual harassment complaint who steadfastly denied allegations of inappropriate conversations of a sexual nature at work and felt employer prejudged him as guilty and began campaign to get rid of him after he refused to admit guilt.
- Employee filed EEOC charge alleging retaliation and thereafter was disciplined and ultimately discharged.
- District court dismissed claim and in overruling that decision, the Supreme Court found that the employee had presented sufficient evidence to create a genuine factual dispute that needed to be resolved by a jury.

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