



Military and Employment Law Client Alert

Court of Appeals Affirms Rights of Returning Servicemembers to Comparable "Seniority, Status and Pay" with Their Former Employers

September 19, 2011

By Ronald W. Meister, Esq. and Peter Porcino, Esq.

On September 13, 2011, the United States Court of Appeals for the Second Circuit decided an important case concerning the rights of military personnel to be reemployed promptly in positions comparable to those they left when called to active duty. The decision provides guidance to employers confronted with this increasingly common situation involving returning reservists.

The case, *Serricchio v. Wachovia Securities*, involved the Uniformed Services Employment and Reemployment Rights Act ("USERRA"), which provides powerful protections to returning veterans. The Act, which is the latest in a series of laws protecting servicemembers' employment rights, guarantees "prompt reemployment" in a position of like "seniority, status and pay" to returning armed forces personnel. Its purpose is to minimize disruption of servicemembers' civilian careers, and to prohibit discrimination against them.

USERRA entitles returning servicemembers to "the seniority and other rights and benefits determined by seniority that the person had on the date of the commencement of service in the uniformed services plus the additional seniority and rights and benefits that such person would have received if the person had remained continuously employed." The Supreme Court has held that the Act's reemployment protections are "to be liberally construed for the benefit of those who left private life to serve their country." Federal Regulations implementing the Act reinforce the requirement that employers take into account pay increases that the employee would have received with reasonable certainty had he or she remained continuously employed. The courts are required to use their "full equity powers" to vindicate the rights of persons protected by the Act.

In *Serricchio*, a returning Air Force reservist, who was employed as a financial advisor prior to his deployment, was granted substantial relief as a result of his employer's failure to reemploy him promptly in a comparable position. He was restored to his prior position, guaranteed a minimum salary, granted back pay, and awarded additional damages for his employer's failure

to reinstate him promptly after he returned from active service. Analyzing what was necessary to ensure that the employee would be no worse off than if he had remained continuously employed, the Court fashioned relief that included a fixed salary, even though he had previously been compensated strictly on a commission basis.

The USERRA statute, and the Court's interpretation and enforcement of it, pose perils for employers and employees alike. An employee seeking the Act's protection must promptly and unequivocally request reinstatement by the former employer. The employer's task is more complex, requiring it "to assess what would have happened to such factors as the employee's opportunities for advancement, working conditions, job location, shift assignment, rank, responsibility, and geographical location, if he or she had remained continuously employed." Analysis of such factors in light of the case law and regulations interpreting USERRA may require professional advice and assistance if employers are to avoid liability for back pay, liquidated damages and injunctive relief.

For further information on this or other military or employment law matters, please contact **Ron Meister** (212-790-9255, rwm@cfl.com) or **Peter Porcino** (212-790-9208, prp@cfl.com).