Protecting Those Who Protected Us

Collaboration between businesses and government to help our nation's veterans reenter the workforce is on the upsurge. Campaigns such as the I Heart Radio "Show Your Stripes" Initiative (*www.showyourstripes.org*), Walmart's "Veterans Welcome Home" Commitment (*www.walmart.com*) and the National Chamber Foundation and Capital One's "Hiring 500,000 Heroes" (*www.uschamber.com/hiringourheroes/hiring500000heroes*) showcase the importance of hiring veterans and the unique skills they offer.

The Louisiana Department of Veterans Affairs (LDVA) provides many services to veterans and their families in health care, education, disability benefits, long-term care and burial honors (*www.vetaffairs.la.gov*). In addition, the LDVA provides information regarding all state and federal programs geared toward employing veterans and using veteran-owned businesses in government contracting (*www.vetaffairs.la.gov/Employment*).

Hiring veterans (and those serving in the reserves) is a laudable goal, but protecting their employment is both laudable and required by state or federal law. The Uniformed Services Employment and Reemployment Rights Act (USERRA) is a federal statute that provides job protection and employment rights to military personnel who serve on active or reserve duty. In 2011, the Department of Labor Veterans Employment and Training Service (VETS) program received more than 1,500 USERRA complaints, nearly 35 percent of which included allegations of some form of employment discrimination (*www.dol.gov/vets/programs/userra*). Twenty-five percent of the complaints involved allegations of improper reinstatement into civilian jobs following military service.

Many businesses are familiar with USERRA, but Louisiana has some little known and rarely used state laws that also protect veterans and reservists. In particular, the Military Service Relief Act, La R.S. 29:401-425, provides, among other things, reemployment rights and retirement credit, life, health and accident insurance coverage. The act also prohibits (1) academic penalties in higher education, (2) employment practices that discriminate against workers or applicants because they are members of the "uniformed services" and (3) retaliation against any person because the person exercises his rights under the law or assists another person in doing so, regardless of whether the person assisting is a member of the military.

Employers should be mindful that if Louisiana law provides more protection than federal law, Louisiana law can be applied in addition to the federal law. For example, USERRA mandates that a reservist who is called to active duty must be restored to his same or comparable position (with no less pay, seniority status or benefits). In addition, Louisiana law requires that once his position is restored, he may not be discharged from his position "without cause within one year after restoration to the position." La. R.S. 29:38(B). Employers should be aware of this added one-year protection, which basically alters the employment-at-will doctrine for one year after a leave for active duty. In addition, Louisiana law provides that if an employer refuses to appropriately restore a reservist to his position, he can bring suit to require compliance and apply to the district attorney to appear and act as attorney for such person in the prosecution or settlement of the claim. Attorney's fees are available for good cause, including in cases where the district attorney may be unwilling or unable to act as the service member's attorney.

The Louisiana Legislature recently enacted a new protection for veterans: leave for veterans who need to attend medical appointments in order to obtain veteran's benefits. La. R.S. 23:331, which went into effect on Aug. 1, 2013, makes it unlawful for an employer to "discharge, otherwise discipline, threaten to discharge, or threaten to discipline" any veteran for time off work

needed to "attend medical appointments necessary to meet the requirements to receive his veteran benefits."

The statute extends to all veterans, defined as "any honorably discharged veteran of the armed forces of the United States including reserved components of the armed forces, the Army National Guard and the Air National Guard, the commissioned corps of the Public Health Service, and any other category of persons designated by the president in time of war or emergency."

An employer may request that the veteran employee verify his attendance at a medical appointment by presenting "a bill, receipt, or excuse from the medical provider." The law does not state how the time should be counted or that such time would not count as sick or personal leave. Therefore, employers likely can deduct the leave for medical appointments from the employee's usual sick or personal leave, similar to how employers often count time off taken under the Family Medical Leave Act (FMLA). However, if the employee has exhausted his sick or personal leave, the statute would prohibit the employer from then using those absences as a basis for discipline or termination.

Even absent this new statute, veterans may have leave rights. To the extent that the medical appointment is for medical treatment, rather than just to meet the requirements to obtain benefits, other federal leave and accommodation statutes may apply. For example, the veteran may have a "serious health condition" that would qualify for intermittent leave for medical appointments under the FMLA, or a disability that may require accommodation over and above the FMLA under the Americans with Disability Act.

However, in some circumstances, whether the federal laws would apply may be less clear — one example may be if the medical appointment was necessary only for filling out paperwork and did not implicate any actual medical need. In addition, if the employer does not employ more than 50 people, the employee has not worked for the employer for more than a year, or if the employee has not worked more than 1,250 hours in the preceding year, the employer would not be subject to the FMLA, and the new Act would not provide protection for that person's job.

In sum, veterans and employers need to be aware of these Louisiana statutes. There may be circumstances under which they provide more protection than the more well known federal leave and accommodation statutes. Employers often understand the need for such leave and accommodation of veterans, but they should be aware of the technical aspects required by law, especially because noncompliance could generate negative publicity while also subjecting the employer to suit, potentially with the parish's district attorney as its opponent.

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Mineral Lease Royalties

Moore Family Resources, L.L.C. v. QEP Energy Co., ____ F.Supp.2d ____, 2013 WL 4851693 (W.D. La. 2013).

The Moores owned property in Bienville Parish. A portion of the property — 433 acres — was covered by a mineral lease originally let to Petro-Chem Operating Co. Petro-Chem later transferred the lease to QEP Energy. Months after, QEP mistakenly sent a royalty check to the Moores in the amount of $330,673.73. The check should have been issued to the family's company, Moore Family Resources, L.L.C. The Moores, however, kept the money and refused to return the funds to QEP. Because of this, QEP withheld payment of future royalties to the Moores. The Moores sued QEP for breach of the mineral lease in state court. QEP removed the case to federal court and filed a counterclaim, asserting multiple claims.

Pursuant to Federal Rule of Civil Procedure 12, the Moores moved to dismiss claims that QEP had asserted for fraud and attorneys' fees. The district court granted the Moores' motion. On the fraud claim, the court found that (1) because there was no evidence that the Moores used subterfuge or misrepresented any facts in order to obtain the $330,673.73 check from QEP and (2) because QEP admitted that the payment of the royalties to the Moores (instead of the Moores' business) was its own internal error, those claims were not valid and, thus, should be dismissed. On the attorneys' fee issue, the court dismissed the claim because QEP abandoned it in its opposition briefing.

Assumption of a Seismic License

In re Virgin Offshore USA, Inc., ____ F.Supp.2d ____, 2013 WL 4854312 (E.D. La. 2013).

This case involved the assumption of a seismic license by a trustee for a bankruptcy debtor, pursuant to 11 U.S.C. §365(c). TGS-NOPEC Geophysical Co., L.P. (TGSN) granted a non-exclusive license to Virgin Offshore to review and use certain seismic data gathered by TGSN covering Ship Shoal 153 (OCS-G 18011). Virgin made a one-time payment as consideration for the seismic license. Eight years later, a petition for involuntary Chapter 11 bankruptcy was filed against Virgin by a number of oil and gas service companies. The trustee for Virgin moved to assume the TGSN seismic license. The bankruptcy court granted the trustee's motion over TGSN's opposition. TGSN appealed the ruling to the district court.

The crux of TGSN's argument on appeal rested on the application and interpretation of 11 U.S.C. § 365(c) of the Bankruptcy Code. Under that provision, a mover must prove the following in order to assume a contract: (1) that the contract is executory, (2) that some non-bankruptcy law applies, (3) that such non-bankruptcy law bars assignment, (4) that such non-bankruptcy law bars assumption, and (5) that the mover does not consent to the assumption of the contract. The district court analyzed each of these factors, concluded that 11 U.S.C. § 365(c) did not apply and, therefore, affirmed the bankruptcy court's ruling because Section 365 could not bar the assumption.

The court made the following findings. As to the first factor, the district court found