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Employer Update

Employment Regulators in Second Obama Administration Expected To Take an Aggressive Tack in 2013

By Leigh Tinmouth

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In the wake of President Obama's re-election, federal agencies are expected to continue to aggressively enforce and interpret labor and employment laws and promulgate new regulations to strengthen the protections provided to employees. Although many of the legislative initiatives that the Obama administration previously supported are likely to remain stalled in a divided Congress,[1] continued vigorous pro-employee action is anticipated from the National Labor Relations Board, the Department of Labor, and the Equal Employment Opportunity Commission.

National Labor Relations Board

The National Labor Relations Board (NLRB or the Board) is expected to continue its tack of broadly interpreting employee rights under Section 7 of the National Labor Relations Act (NLRA), including applications of such rights to employees who are not represented by any labor union. This trend will likely best be illustrated during the coming months by the NLRB's continued evaluation of social media policies. In September 2012, the NLRB determined in *Costco Wholesale Corp.* that an employee handbook provision prohibiting employees from electronically posting statements that "damage the Company, defame any individual or damage any person's reputation, or violate the policies outlined in the Costco Employee Agreement" violated Section 8(a)(1) of the NLRA because employees could reasonably construe the provision to prohibit Section 7 activities.[2] The Board explained that the employee handbook presented no "accompanying language" permitting "certain protected concerted activities, such as communications that are critical of [Costco's] treatment of its employees."[3]

In addition, the NLRB's recent decision in *Hispanics United of Buffalo, Inc.*[4] further demonstrated that employees have a federally protected right to communicate on social media about their working conditions and employers. In that case, an employee, communicating from home on her personal computer, posted a message on her Facebook page pertaining to a co-worker's comments regarding the purportedly substandard work performance of her fellow employees. Four other off-duty employees responded by posting Facebook messages objecting to the assertion that their work performance was substandard.

The NLRB found that these activities constituted concerted activity within the meaning of Section 7 because, in responding to the first Facebook posting, the four additional employees "made common cause" with the employee that posted the initial message and "took

the first step towards taking group action to defend themselves against the accusations they could reasonably believe"[5] would be brought to management. It also concluded that the Facebook comments were protected because the five employees were providing "mutual aid of each other's defense"[6] to the criticisms that their work was subpar. Finally, the NLRB rejected the employer's position that it was entitled to discharge the employees because the activities in which they engaged constituted unprotected harassment and bullying. It explained that managerial concerns regarding the prevention of harassment did not "justify policies that discouraged the exercise of Section 7 rights by subjecting employees to . . . discipline on the basis of subjective reactions of others."[7]

Social media policies will likely receive continued scrutiny from the NLRB in 2013. The Board is expected, for example, to issue a decision in the coming months that will address whether selecting the "Like" option on a Facebook page may constitute protected concerted activity.[8] The NLRB, in this case and in other social media cases, is expected to remain receptive to challenges to facially neutral policies that could reasonably be interpreted to limit Section 7 activity.

Notably, none of the cases discussed above involved union-represented workforces.

The appeal from the NLRB's landmark decision in *D.R. Horton, Inc.* on the subject of class action waivers will also be decided in 2013 by the United States Court of Appeals for the Fifth Circuit. In *D.R. Horton*, the NLRB considered whether employees covered by the NLRA could lawfully be made to sign agreements precluding them from filing joint, class, or collective claims as a condition of their employment.[9] It determined that employees who "join together to bring employment-related claims on a classwide or collective basis in court or before an arbitrator are exercising rights protected by Section 7 of the NLRA."[10] The NLRB therefore invalidated the Mutual Arbitration Agreements at issue in the case on the ground that they barred employees from exercising their substantive Section 7 rights. It further found that no conflict existed between the NLRA and the Federal Arbitration Act (FAA) under the circumstances presented in *D.R. Horton* because the class action "waiver interfere[d] with substantive rights under the NLRA, and the intent of the FAA was to leave substantive rights undisturbed."[11] D.R. Horton, Inc. appealed the NLRB's determination and a decision by the Fifth Circuit is anticipated this year. Significantly, the substantial majority of courts to have addressed this issue subsequent to *D.R. Horton* have rejected the NLRB's analysis,[12] fueling speculation that the NLRB's decision will be overturned in favor of a ruling more consistent with the recent pro-arbitration decisions of the US Supreme Court.

The NLRB is also expected to closely examine at-will employment policies in 2013. In *American Red Cross Arizona Blood Services Region*, an Administrative Law Judge determined that an employee handbook provision pursuant to which employees agreed "that the at-will employment relationship cannot be amended, modified or altered in any way" violated Section 8(a)(1) of the NLRA.[13] The judge explained that the provision premised employment on an employee's agreement not to take concerted actions to alter his or her employment at-will status.

The NLRB's Office of the General Counsel recently mitigated much of the controversy that this decision generated when it published advice memoranda analyzing two at-will employment provisions that were deemed lawful upon examination. The memoranda noted that, unlike the provision at issue in *American Red Cross Arizona Blood Services Region*, the lawful provisions did "not require employees to refrain from seeking to change their at-will status or to agree that their at-will status [could not] be changed in any way."[14] In a clear indication that at-will employment provisions will remain subject to close scrutiny by the NLRB, however, the memoranda requested that regional offices submit all cases involving the restriction of modifications to an employee's at-will status to the Division of Advice.

Finally, the NLRB has promulgated several rules that may become effective this year. On December 22, 2011, the NLRB published a Final Rule modifying the procedures for filing and processing petitions relating to the representation of employees for purposes of collective bargaining with their employer.[15] The changes that the NLRB approved would, *inter alia*, provide the hearing officer the discretion and authority to determine whether a hearing should occur, permit the hearing officer to decide whether post-hearing briefs may be submitted, eliminate the right of a party to seek review of a regional director's pre-election rulings until after the election, remove language recommending that a regional director not schedule balloting within 25 days of directing an election, and eliminate NLRB review of post-election disputes as a matter of right. Termed "ambush" election provisions because these modifications would require an employer to accept a petitioned for unit or face an election on a substantially shortened timeframe, the NLRB's proposal was invalidated in May 2012 by the US District Court for the District of Columbia on the ground that the Final Rule was adopted without the statutorily required quorum.[16] The NLRB has appealed this decision to the DC Circuit and challenges the trial court's determination that Member Brian Hayes did not participate in issuing the Final Rule because he took no definitive action after announcing that he would abstain from voting.

Legal challenges to the NLRB's notice posting rule should also be decided in 2013. On August 30, 2011 the NLRB issued a Final Rule requiring employers to post notices outlining the rights of employees under the NLRA.[17] The Final Rule states that an employer that does not post the notice commits an unfair labor practice and also provides for the tolling of the six-month statute of limitations for unfair labor practice charges for charges filed against employers that failed to post the notice. The US District Court for the District of South Carolina struck down the Rule in its entirety after determining that the NLRB exceeded its rulemaking authority and, consequently, violated the Administrative Procedure Act.[18] The court observed that the NLRB was empowered only to issue "rules and regulations as may be necessary to carry out the provisions"[19] of the NLRA. It determined that the notice posting rule was therefore invalid because it was "simply useful"[20] and "inconsistent with the Board's reactive role under"[21] the NLRA.

The appeal from the NLRB's landmark decision in *D.R. Horton, Inc.* on the subject of class action waivers will be decided in 2013 by the Fifth Circuit.

The US District Court for the District of Columbia determined, in contrast, that the NLRB had the authority to promulgate the notice posting rule.[22] It concluded, however, that the unfair labor practice provision was invalid because "the Board must make a specific finding based on the facts and circumstances in the individual case before it that the failure to post interfered with the employee's exercise of his or her rights."[23] The court similarly found that the Final Rule's equitable tolling provision should be struck down because it "strip[ped] away the case-specific nature of the equitable tolling doctrine by imposing it as the rule rather than the exception."[24] The NLRB appealed each of these rulings and decisions from the Fourth Circuit and DC Circuit are expected in the coming months.

Department of Labor

Notwithstanding the recent resignation of Secretary of Labor Hilda Solis, the Department of Labor (DOL) is expected to continue to prioritize its "Employee Misclassification" initiative in the wake of President Obama's re-election. As part of this initiative, the DOL will likely promulgate Right to Know regulations in 2013 that will reportedly require an employer to draft a written analysis in support of its decision to classify an employee as exempt from the Fair Labor Standards Act, provide the analysis to the employee, and maintain a copy of the analysis for inspection by the Wage and Hour Division.[25] This proposal was filed in the section designated "Long-Term Actions"

in the most recent Unified Regulatory Agenda published on January 20, 2012. Long-Term Actions are defined as "items under development but for which the agency does not expect to have a regulatory action within the 12 months after publication of this edition of the Unified Agenda."[26] The Wage and Hour Administrator has indicated expressly, however, that this proposal remains a priority.

Additionally, the DOL's Wage and Hour Division has signed Memoranda of Understanding with thirteen states that seek to limit employee misclassification through joint investigations and the exchange of information. The signatory states are California, Colorado, Connecticut, Hawaii, Illinois, Louisiana, Maryland, Massachusetts, Minnesota, Missouri, Montana, Utah, and Washington, and the DOL is actively pursuing participation by additional states.[27]

The DOL has also proposed regulations that would limit the advice exemption to the reporting requirements established under the Labor-Management Reporting and Disclosure Act for agreements or arrangements between employers and labor relations consultants or law firms pursuant to which the consultants or law firms persuade employees concerning their rights to organize and bargain collectively.[28] Under the DOL's existing interpretation of "advice", an agreement or arrangement need not be reported if the consultant or law firm has no direct contact with employees. The proposed regulations would expand the circumstances in which disclosure is required to include providing persuader material to employers for distribution to employees, coordinating or directing the activities of supervisors charged with persuading employees, and drafting policies for the employer that have the purpose of persuading employees.[29] Although the DOL asserts that narrowing the advice exemption will assist employees "in their decision making process regarding union representation,"[30] there is widespread concern that these amendments would compel attorneys to disclose confidential client information. Final regulatory action on these revisions, initially designated for August 2012, is now anticipated in 2013.

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Finally, the DOL is expected once again to propose, in early 2013, a previously proposed regulation that would "more broadly define the circumstances under which a person is considered to be a 'fiduciary' by reason of giving investment advice" under the Employee Retirement Income Security Act.[31] This regulation will likely abolish the five-part test that must presently be satisfied for a person to be deemed a fiduciary by reason of providing investment advice. It should thus eliminate the requirements that investment advice be rendered on a regular basis, serve as the primary basis for investment decisions, and be provided pursuant to a mutual agreement.[32] The DOL's proposal may also broaden the types of recommendations that may result in fiduciary status to include appraisals and fairness opinions on employee stock ownership plans.[33]

Equal Employment Opportunity Commission

The Equal Employment Opportunity Commission (EEOC) approved a final Strategic Enforcement Plan (SEP) in December 2012 that outlines its enforcement priorities for the next four years.[34] It reaffirms that "[e]radicating systemic discrimination" remains "one of the EEOC's top priorities."[35] Systemic charges that implicate the national priorities established in the SEP will therefore "be given precedence over individual priority matters and over all non-priority matters."[36]

The SEP identifies eliminating barriers in recruitment and hiring as one national priority that "will receive a greater share of agency time and resources"[37] as the EEOC fulfills its statutory obligations. The SEP provides that discrimination in this context may arise from exclusionary

policies and practices, the channeling of individuals into specific jobs due to their status in a particular group, restrictive application processes, and the use of screening tools such as pre-employment tests and background checks.[38]

Employers should take extra care to align their use of criminal background checks with the Enforcement Guidance that the EEOC issued on this subject in April 2012.[39] The Enforcement Guidance presumes that consideration of criminal history information has a disparate impact under Title VII. It therefore focuses primarily on how employers may meet their burden of demonstrating that the use of criminal history information is job related and consistent with business necessity. The Enforcement Guidance observes that employers may satisfy this burden when they validate the criminal conduct screen per the EEOC's Uniform Guidelines on Employee Selection Procedures or when they "develop[] a targeted screen considering at least the nature of the crime, the time elapsed, and the nature of the job . . . and then provide[] an opportunity for an individualized assessment for people excluded by the screen to determine whether the policy as applied is job related and consistent with business necessity."[40]

The SEP also establishes emerging and developing issues as a national priority. It notes explicitly that one such issue is the coverage of lesbian, gay, bisexual, and transgender persons under the sex discrimination provisions of Title VII. In April 2012, the EEOC found that complaints of discrimination based on gender identity, change of sex, or transgender status are cognizable under Title VII.[41] The EEOC noted that several courts had previously recognized that discrimination on the basis of sex stereotyping is discrimination on the basis of sex.[42] Critically, however, it explained that "evidence of gender stereotyping is simply one means of proving sex discrimination"[43] and concluded that "intentional discrimination against a transgender individual because that person is transgender is, by definition, discrimination 'based on . . . sex.'"[44] This reasoning may prove to have broad reach in the coming months because of its potential application to other gender-related classifications not expressly protected by Title VII, including claims based upon sexual orientation.

Finally, pregnancy discrimination is also highlighted in the SEP as an emerging issue. The EEOC has filed multiple lawsuits against employers for pregnancy-related discriminatory practices since its draft SEP was published in September 2012. Such practices include mandating unpaid leave for female employees after the third month of pregnancy,[45] terminating employees who became pregnant,[46] requiring pregnant employees to obtain notes from their physicians certifying that they can continue to work,[47] and refusing to permit an employee to return to work following maternity leave.[48] These cases illustrate the importance of making employment decisions without regard to whether workers are pregnant and permitting female employees to determine for themselves whether they remain capable of working.

In sum, employers can expect an emboldened and aggressive approach to labor and employment matters in the upcoming second Obama administration. Please watch for future issues of the *Employer Update* in which we will advise our readers of new developments as they occur.

1 This legislation includes the Employee Free Choice Act, Employment Non-Discrimination Act, Paycheck Fairness Act, Protecting Older Workers Against Discrimination Act, and Working Families Flexibility Act.

2 *Costco Wholesale Corp.*, 358 N.L.R.B. No. 106 (Sept. 7, 2012).

3 *Id.* Similarly, in *Karl Knauz Motors, Inc.*, 358 N.L.R.B. No. 164 (Sept. 28, 2012) the NLRB examined a "courtesy" provision in an employee handbook. It found this provision unlawful because employees could "reasonably construe its broad prohibition against 'disrespectful' conduct and 'language which injures the image or reputation of the Dealership' as encompassing Section 7 activity." The NLRB noted that the employee handbook contained no language indicating that employee communications protected by Section 7 were "excluded from the rule's broad reach."

4 *Hispanics United of Buffalo, Inc.*, 359 N.L.R.B. No. 37 (Dec. 14, 2012).

5 *Id.*

6 *Id.*

7 *Id.*

8 *Three D, L.L.C.*, Nos. 34-CA-12915 & 12926 (N.L.R.B. Div. of Judges Jan. 3, 2012).

9 *D.R. Horton, Inc.*, 357 N.L.R.B. No. 184 (Jan. 3, 2012).

10 *Id.*

11 *Id.*

12 *See* Reply Brief for Petitioner/Cross-Respondent at 1-3, *D.R. Horton, Inc. v. NLRB*, No. 12-60031 (5th Cir. Oct. 10, 2012) (observing that eighteen federal district and state appellate courts have declined to follow the reasoning of the NLRB).

13 *Am. Red Cross Ariz. Blood Servs. Region*, No. 28-CA-23443 (N.L.R.B. Div. of Judges Feb. 1, 2012); *see* Lawrence J. Baer & Olivia Zimmerman Miller, "NLRB Places Employment At-Will Disclaimers Under Scrutiny," *Weil Employer Update*, May-June 2012, at 16-17.

14 NLRB Office of the General Counsel, Advice Memorandum, SWH Corp., Case 28-CA-084365 (Oct. 31, 2012); NLRB Office of the General Counsel, Advice Memorandum, Rocha Trans., Case 32-CA-086799 (Oct. 31, 2012).

15 Representation – Case Procedures, 76 Fed. Reg. 80,138 (Dec. 22, 2011) (to be codified at 29 C.F.R. pts. 101 & 102).

16 *Chamber of Commerce v. NLRB*, No. 11-2262, 2012 WL 1664028, at *1 (D.D.C. May 14, 2012).

17 Notification of Employee Rights Under the National Labor Relations Act, 76 Fed. Reg. 54,006 (Aug. 30, 2011) (to be codified at 29 C.F.R. pt. 104).

18 *Chamber of Commerce v. NLRB*, 856 F. Supp. 2d 778, 792 (D.S.C. 2012).

19 *Id.* at 781.

20 *Id.* at 788.

21 *Id.* at 791.

22 *Nat'l Ass'n of Mfrs. v. NLRB*, 846 F. Supp. 2d 34, 45 (D.D.C. Mar. 2, 2012).

23 *Id.* at 54.

24 *Id.* at 58.

25 *See* Office of Information and Regulatory Affairs, Office of Management and Budget, Right to Know Under the Fair Labor Standards Act, http://www.dol.gov/whd/regs/unifiedagenda/ fall2010/1235-AA04.htm (last visited Dec. 15, 2012).

26 Office of Information and Regulatory Affairs, Office of Management and Budget, Fall 2011 Regulatory Plan and the Unified Agenda of Federal Regulatory and Deregulatory Actions, http://www.reginfo.gov/public/do/eAgendaHistory?operation=OPERATION_GET_PUBLICATION&showstage=longterm&currentPubId=201110 (last visited Dec. 15, 2012).

27 Press Release, US Dep't of Labor, Labor Secretary, US Labor Department, Louisiana Workforce Commission Sign Agreement to Reduce Misclassification of Employees as Independent Contractors (Feb. 23, 2012), *available at* http://www.dol.gov/opa/media/press/whd/ whd20120205.htm.

28 *See* Labor Management Reporting and Disclosure Act; Interpretation of the "Advice" Exemption, 76 Fed. Reg. 36,178 (proposed June 21, 2011) (to be codified at 29 C.F.R. pts. 405 & 406).

29 *Id.* at 36,182.

30 *Id.* at 36,187.

31 Definition of the Term "Fiduciary", 75 Fed. Reg. 65,263 (proposed Oct. 22, 2010).

32 *Id.* at 65,265.

33 *Id.*

34 U.S. Equal Employment Opportunity Commission, Strategic Enforcement Plan, FY 2013-2016 (2012).

35 *Id.* at 12.

36 *Id.*

37 *Id.* at 5.

38 *Id.* at 9.

39 EEOC Enforcement Guidance, Enforcement Guidance on the Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII of the Civil Rights Act of 1964 (2012).

40 *Id.* at 14.

41 *Macy v. Holder*, E.E.O.C. Dec. No. 0120120821, 2012 WL 1435995, at *1 (Apr. 20, 2012).

42 *See, e.g.*, *Prowell v. Wise Bus. Forms, Inc.*, 579 F.3d 285, 289 (3d Cir. 2009) (observing that the exclusion of sexual orientation discrimination from the scope of Title VII "does not mean . . . that a homosexual individual is barred from bringing a *sex discrimination* claim under Title VII") (emphasis in original).

43 *Macy*, 2012 WL 1435995, at *10.

44 *Id.* at *11.

45 Press Release, Bayou City Wings Sued by EEOC for Pregnancy Discrimination (Sept. 26, 2012), *available at* http://www.eeoc.gov/eeoc/newsroom/release/9-12-26d.cfm.

46 Press Release, EEOC Sues J's Seafood Restaurant of Panama City for Pregnancy Discrimination (Sept. 27, 2012), *available at* http://www.eeoc.gov/eeoc/newsroom/release/9-27-12i.cfm.

47 Press Release, Muskegon River Youth Home Sued By EEOC for Pregnancy Policy (Sept. 27, 2012), *available at* http://www.eeoc.gov/eeoc/newsroom/release/9-27-12c.cfm.

48 Press Release, Security Company Sued for Pregnancy Discrimination (Sept. 20, 2012), *available at* http://www.eeoc.gov/eeoc/newsroom/release/9-20-12.cfm.

USERRA Does Not Bar Layoffs

By Olivia Zimmerman Miller

As the US military winds down its operations in Afghanistan and military personnel return to the civilian workforce, employers will be faced with increased instances in which they will be called upon to apply the provisions of the Uniformed Services Employment and Reemployment Rights Act (USERRA), a statute governing the reemployment rights of returning service members. Generally, USERRA ensures that upon completion of military service, returning service members are reinstated by their civilian employer to the "position of employment" the service member would have held had his employment "not been interrupted by military service." *See* 38 U.S.C. § 4301, *et seq.*[1]

Recently, the United States Court of Appeals for the Eighth Circuit in *Milhauser v. Minco Prods., Inc.*, NO. 12-1756, 2012 WL 6028050 (8th Cir. Dec. 5, 2012), was called upon to determine whether termination of employment could be deemed an acceptable "position of employment," in compliance with USERRA, where an employer could demonstrate that the returning service member's employment would have been terminated regardless of his military service. The court held that termination was a valid "position of employment," in compliance with USERRA, under such circumstances.

In interpreting USERRA, courts have referred to the position of employment in which the military member would have been employed had employment not been interrupted by military service as the "escalator position." *Milhauser*, 2012 WL 6028050, at *2 (citing *Fishgold v. Sullivan Drydock & Repair Corp.*, 328 U.S. 275, 284-5 (1946)). This concept envisions the absent military member on a particular step of an escalator that continues to move, both up and down, in his absence. Upon return from military duty, the service member must be returned to the position where his step has "moved" during his absence. *Id.*

Milhauser provides clarity to employers who seek to terminate a service member's employment if his civilian position would have been eliminated during his military service and he would not otherwise have a position with the company.

In *Milhauser*, the plaintiff began work as a maintenance technician for Minco in 2006. His work was considered inconsistent and he had received at least one written reprimand from his supervisors. Between 2007 and 2009, Milhauser took three military leaves of absence, his last one commencing in March of 2009.[2] Upon return from his first deployment, some of his duties had been reassigned to other maintenance technicians and replaced with menial tasks. In 2008, Minco's customer orders began to decline and Minco posted its first ever annual loss. *Id.* As a result, Minco began a series of cost-cutting measures, including delaying new equipment purchases, reducing overtime, and reducing pay rates. As customer orders declined further, in March 2009, Minco reduced its workforce by eliminating 18 positions. In a second round of job eliminations scheduled for June 2009, Minco planned to reduce its workforce by 32 additional positions. In preparation for the planned June 2009 workforce reduction, plaintiff's supervisor was asked to identify four employees, of the 13 he supervised, to be considered for termination. The criteria for termination were based upon job duties, technical expertise, and subjective factors such as attitude and work ethic. Seniority was not a significant factor in the employer's analysis. Milhauser's supervisor recommended Milhauser for termination because he believed that Milhauser did not possess a unique skill set and that his job responsibilities could easily be absorbed by the remaining maintenance technicians. As a result, upon Milhauser's return to work on June 3, 2009, Milhauser's position was eliminated. Milhauser then filed

suit against Minco alleging discrimination on the basis of military service and failure to provide reemployment as required by USERRA.[3]

At trial, Minco presented evidence that Milhauser had been a poor employee and that the reductions in force were made for legitimate economic reasons. *Id.* at *2. It asserted an affirmative defense under 38 U.S.C. § 4313(a)(1)(A) that changed circumstances had made reemploying Milhauser impossible or unreasonable, or that in the alternative, it had not failed to place Milhauser in the proper employment position because he would have been discharged notwithstanding his military service. *Milhauser*, 2012 WL 6028050, at *1. After receiving instruction that under the escalator principle, "the employee should be in the same position he would have been in had he not taken military leave, no better and no worse," the jury found that although Minco had not established its affirmative defense, Minco was nevertheless entitled to prevail because Minco had established that Milhauser's employment would have been terminated even if Milhauser's employment had not been interrupted by military service. *Id.*

On appeal, Milhauser argued that termination could not be deemed a valid "position of employment" in compliance with USERRA. *Id.* The Eighth Circuit rejected Milhauser's argument, finding that under the statute and interpretive regulations promulgated by the US Department of Labor, the escalator principle properly could be applied to terminate an employee under the circumstances presented. *Id.* at *3 (citing 20 C.F.R. § 1002.194) ("The regulations state that "[d]epending on the circumstances, the escalator principle may cause an employee to be reemployed in a higher or lower position, laid off, or even terminated."').

While the *Milhauser* decision makes clear that an employer may terminate a service member's employment if it can establish that his position would have been eliminated during his military service, employers should be cautioned that each case will be judged based upon its specific facts and circumstances and in light of USERRA's remedial purpose of ensuring that returning service members do not suffer adverse employment consequences on account of their military service. The facts in *Milhauser* were strongly in favor of the employer's position. There, the returning service member's position was terminated as part of a large and economically necessary reduction in force and the employer presented evidence demonstrating its legitimate reasons for selecting the military member for participation in that reduction in force (including a documented poor work performance). Even under circumstances where a properly documented reduction in force occurs, employers should be further cautioned that USERRA requires that a returning military member be afforded all opportunities that are afforded to other employees participating in the reduction in force. Thus, if employees identified for layoff are given the opportunity to seek other work within the employer's company, the returning military member also must receive that opportunity.

The Court's decision in *Milhauser* reinforces the well-established principle that compliance with USERRA requires that employers treat returning service members just as though their employment had not been interrupted by military service – no better and no worse.

1 USERRA is a federal law that does not apply to state activations or governor call-ups of members of the Army or Air National Guard (e.g., the activation of National Guard troops in response to Superstorm Sandy). *See* 38 U.S.C. § 4303(4)(B). However, employment protection for such duty is generally provided by state statutes that are often comparable to, or provide more safeguards to service members, than the protections provided under USERRA. USERRA also prohibits discrimination in hiring, promotion, and retention on the basis of present and future membership in the armed services. 38 U.S.C. at § 4311.

2 During his last deployment, Milhauser suffered a severe reaction to a vaccine, ending his military career in June of 2009.

3 The jury returned a verdict for Minco on the discrimination claim; Milhauser did not appeal. *Milhauser*, 2012 WL 6028050, at *3.

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